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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

HIND, ROLPH & COMPANY (a copartnership), and 1,727,783 feet of lumber loaded on board the schooner "LEVI W. OSTRANDER", and FIDELITY DEPOSIT COMPANY OF MARYLAND (a corporation),

Appellants and Cross-Appellees,

vs.

H. F. OSTRANDER,

Appellee and Cross-Appellant.

BRIEF FOR APPELLANTS.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Proctors for Appellants.

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Appellee and Cross-Appellant.

BRIEF FOR APPELLANTS.

I. Statement of the Case.

A. OUTLINE OF CONTROLLING FACTS.

On May 15, 1917, appellee, of Seattle, as owner, made a contract of charter-party with appellants, of San Francisco, as charterers, chartering a schooner "now building at Seaborn Yards, Tacoma", for a voy-

age from Puget Sound to South Africa with a cargo of sawn lumber. The shipyard mentioned was owned by appellee, and the schooner, when completed, was named the "Levi W. Ostrander". On July 2nd, while the schooner was still in course of construction, appellants designated Mukilteo and Port Angeles as loading ports. On August 13th appellee wired to appellant: "Schooner will be ready for cargo by August 25th". On October 12th her master took charge of the newly built schooner (69),* and on October 13th she left Seaborn Yards, in tow of a tug, and proceeded to her loading place, at the wharf of the Puget Sound Mills and Timber Company at Port Angeles, where she arrived on Sunday, October 14th (53).

On October 15, 1917, the master of the schooner gave notice to the mill that his vessel was ready to load (54); and delivered simultaneously a surveyor's certificate intended to meet the requirement of the charter-party, "vessel to furnish a certificate from a Marine Surveyor of the San Francisco Board of Underwriters that she is in proper condition for the voyage" (13). We shall show hereafter that this certificate did not comply with the terms of the charter-party.

The charter-party contained no clause fixing the beginning of, or number of days allowed for loading, the printed provisions of article H, therein, ordinarily serving such a purpose, being expressly struck out.

On October 18th loading commenced. The full cargo consisted of 1,750,000 feet. On October 18th there was

*Numbers in parenthesis refer to pages of Apostles.

about 450,000 feet ready on the dock, and on October 31st the schooner had 747,203 feet on board. The schooner was completely loaded on November 24th. During the loading the work of procuring and sawing the timber, and loading the sawn lumber, was hindered and delayed by the effect of an historical general labor strike on Puget Sound and the Northwest, as a result of which the logging camps and the loading mills at Port Angeles were entirely closed down from July 16th to September 6th (203), and the mill of the Puget Sound Mills and Timber Company was left in a crippled condition for the remainder of the year 1917 (184). The evidence shows that the mill used every reasonable endeavor to dispatch the loading under the abnormal circumstances between October 18th and November 24th.

After the loading of the schooner the vessel was detained by appellee on account of the refusal of appellants to pay a demurrage bill presented to them by appellee (Libel, Art. V., Ap. p. 8). On November 30, 1917, appellee filed the libel for demurrage in the present action and attached the cargo of the schooner. This caused a further delay of the schooner. Appellant promptly filed a bond to secure the release of the cargo. Partly for appellee's own reasons and convenience, and partly by the action of the United States Government, the schooner was thereafter detained until December 26, 1917, when she sailed from Port Angeles.

The above transactions were incidental to the performance, by appellants, of a contract for the sale of the cargo of the "Levi W. Ostrander", to buyers in South Africa.

To perform this contract appellants had in turn contracted for the purchase of said cargo from Douglas Fir Exploitation and Export Company, a corporation, whose stockholders are various mills in the States of Oregon and Washington, including the Puget Sound Mills and Timber Company (418-420). In its contract with appellants it was agreed by Douglas Fir Exploitation and Export Company that the cargo of the "Levi W. Ostrander" should be delivered by the latter alongside on wharf within reach of ship's tackle.

The Douglas Fir Exploitation and Export Company, in its turn, assigned the order for the supplying of this cargo to the Charles Nelson Company, which controls the Puget Sound Mills and Timber Company (202), one of the constituent members of Douglas Fir Exploitation and Export Company (419), and both appellants and appellee consented to the assignment of Puget Sound Mills and Timber Company, at Port Angeles, as the mill by which the full cargo of the vessel should be furnished, and at whose wharf it should be delivered to the vessel.

B. QUESTIONS INVOLVED.

(1) In his libel appellee contended for demurrage during three periods:

First:	From August 25th to October 13th,	49 days	
Second:	From October 13th to November 24th,	27 days	(after deducting 13 laydays)
Third:	After November 24th,	5 days	
Total:		81 days	at $250.00 per day —$20,250.00.

(2) The District Court rendered a decree as follows:

• *First:* Denying demurrage from August 25th to October 13th.

Second: Awarding demurrage from October 15th to December 14th, less fourteen laydays not including Sundays, making 45 days demurrage at $250.00 per day, $11,250.00.

(3) Appellants appeal from that part of the decree only, which awards demurrage for *forty-five* days.

C. SPECIFICATIONS OF ERRORS RELIED UPON.

Appellant relies for a reversal of the decree of the District Court upon all the errors specified in the assignment of errors (451-456), which are, for the sake of convenience, treated in this brief under the following headings:

First: Appellee is not entitled to any demurrage for the period from October 15th to November 24th, during which the schooner was engaged in loading at Port Angeles.

Second: Appellee is not entitled to any demurrage for any period after November 24th, when the schooner had completed her loading.

II. Brief of the Argument.

FIRST: BURDEN OF PROOF IS UPON LIBELANT—APPELLEE TO SHOW NEGLIGENCE ON THE PART OF APPELLANTS IN LOADING THE CHARTERED VESSEL.

The usual provision of the printed charter fixing the beginning of loading, and the number of days allowed for the loading, is expressly struck out of this charter-party (Defendant's Exhibit C). In view of the fact, that, at the time when the contract was made, the vessel was unbuilt; that the country had recently entered into the world-war; that difficulties and obstacles could be reasonably foreseen, by both parties, both in the business of building ships for private purposes, and the business of exporting lumber for commercial gain, it was but natural that neither the builder of the future ship nor the furnishers of the future cargo should be willing to bind themselves to any fixed dates when the vessel should be delivered to the charterer and the charterer should be ready to load the cargo.

Under such circumstances, it is the law that the charterer is liable only for unnecessary or unreasonable delay in the loading of the ship, and the owner

assumes the burden of proof to show that the charterer was negligent in the loading of the chartered vessel.

Williscroft v. Cargo of the "Cyrenian", 123 Fed. 169.

Liability of the charterer to that extent was contemplated by the parties to this contract when it was made, just as they then contemplated a corresponding liability of the owner of the ship, had he, making allowances for the unusual circumstances prevailing at the time when the contract was made and when it was executed, been remiss in his duty to tender the vessel for loading within a reasonable time.

SECOND: APPELLEE IS NOT ENTITLED TO ANY DEMURRAGE FOR THE PERIOD FROM OCTOBER 15th TO NOVEMBER 24th, DURING WHICH THE SCHOONER WAS ENGAGED IN LOADING AT PORT ANGELES.

I. NEITHER BEGINNING OF LAYDAYS NOR DEMURRAGE WERE FIXED BY THE CHARTER-PARTY, AND APPELLANTS PERFORMED ALL THEIR OBLIGATIONS AS TO LOADING.

On Sunday, October 14, 1917, the schooner arrived at the loading mill at Port Angeles.

On Monday, October 15, 1917, her master delivered to the mill a notice that the vessel was then ready to load.

A. The District Court erred in holding that demurrage days began on October 15th.

The District Court, in its decree, awarded demurrage to appellee for the period beginning with October

15, 1917; "awarding to the libelant demurrage for the period between October 15, 1917, and December 14, 1917, less fourteen loading days, but not including Sundays (Decree 447).

This is clearly an error for this reason:

Assuming, for the sake of argument only, that the vessel was ready on October 15th, and that appellee had complied with all other conditions on that day, it would nevertheless be error to count the demurrage days as running from October 15th, and to award demurrage for a period beginning on that day.

B. On the erroneous assumption that the beginning of demurrage days was on October 15th, the District Court committed another error in calculating the number of demurrage days.

The error of setting the beginning of demurrage days as of October 15th, is not cured by deducting "fourteen loading days, but not including Sundays", from the assumed period of demurrage days. The decree defines the period of demurrage as *"the period between October 15, 1917, and December 14, 1917, less fourteen loading days, not including Sundays"* (447). Excluding October 15th and December 14th, this period embraces fifty-nine running days; deducting therefrom the seven Sundays within this period, leaves fifty-two days, and deducting again fourteen days allowed by the court for loading, leaves *thirty-eight* days demurrage. Both October 15th and December 14th must be excluded (*Merritt v. Ona,* 44 Fed. 369). If allowance is made for Saturday afternoons as

half holidays, there would be a further deduction of 3½ days. It appears, therefore, by mathematical demonstration, that the lower court, after setting erroneous limits to the alleged demurrage period, committed another error in its calculation of the number of days in favor of appellee, by at least seven, and possibly ten and one-half days. This excess above what the court intended to award involves an excess of $1750 or $2625 respectively, in the amount of the decree.

C. Laydays did not begin as early as October 15th, vessel not being physically ready to load until October 18th.

1. Appellee insructed his master not to begin loading until October 18.

Appellant cannot be charged with laydays before October 18th, because the master of the vessel was instructed by appellee not to load before that day.

On October 16th the mill delivered a letter to the captain, saying:

> "It is agreeable with us you commence loading now or any time your vessel is ready to receive cargo" (Respondent's Exhibit A-5).

The captain replied the same day:

> "In answer to your letter of even date I wish to state that I have *orders* from the owners in Seattle *to await instructions before commencing to load"* (Respondent's Exhibit A-16).

On October 16th, at 2:22 P. M., appellee telegraphed to his captain:

> "Please notify the mill that you *will now* receive cargo as offered" (Respondent's Exhibit A-3).

On the same day, at 6:05 P. M., appellee wired again to his captain:

> "Further to my wire this date, if notice not already given, deliver to mill as requested."

Thereupon, on October 17th or 18th (Respondent's Exhibit A-8), the captain delivered to the mill company a letter as follows:

> "This is to notify you that the Schooner 'Levi W. Ostrander' *will be* ready to receive cargo today at 1 P. M. I also agree under existing conditions to sign a demurrage release to your mill upon completion of cargo" (Respondent's Exhibit A-7).

In the forenoon of October 18th the captain wrote to his owner:

> "According to instructions in your telegram received last night, I again tendered a notice to the Puget Sound Mills and Timber Co. stating that the Schooner 'Levi W. Ostrander' was ready to receive lumber, and that upon completion of cargo I would sign a demurrage release for account of the mill under existing conditions. They accepted the notice and agreed to commence loading at 1:00 P. M. today. Mr. Ryan informed me later that *he had orders from you not to start loading* until further orders; so we are *therefore* at a standstill yet" (Respondent's Exhibit B).

After appellee had received his captain's letter, he wired, at 10:25 A. M. on October 18th:

> "* * * it is *now* in order to begin loading" (Respondent's Exhibit A-10).

These facts are common ground between the parties hereto. It follows that—assuming that appellee has any claim for demurrage in this case, which is denied—

the failure to commence loading before October 18th, at 1:00 P. M., was due to appellee's orders to his captain. Laydays could not, therefore, commence to count before the day and hour last mentioned.

2. Appellants' legal obligation to begin loading did not mature before October 18th.

a. *Because no proper Surveyor's Certificate was tendered by appellee.*

The vessel was not *"ready to load"*, under the charter-party, on October 15th. Assuming that she was then in fact physically tight, staunch, strong, and in every way fitted and provided for the intended voyage, there remained another condition precedent to the loading unfulfilled, viz., the charter-party condition that appellee was to furnish "a certificate from a Marine Surveyor of the San Francisco Board of Underwriters that she *is* in proper condition for the voyage" (Clause J Ap. 13). The vessel had just been completed; the charterer could not be expected to begin to load a valuable cargo for the long voyage from Puget Sound to South Africa on a new and untried vessel, nor could he obtain insurance on his cargo, without a preliminary and thorough survey by the representative of the underwriters showing that the new schooner was seaworthy on October 15th, when she reported her readiness to receive the cargo.

In the case of *J. J. Moore & Co. v. Cornwall,* 144 Fed. 22, this court decided that such a charter-party provision contemplates "an actual survey and inspection of the vessel" (30)

The survey certificate must show that, when tendered to charterer for the voyage at the loading place, "she *is* in proper condition *for the voyage*". It was not sufficient to show that she was seaworthy at some other time (August or September), and some other place (Seaborn Yards at Tacoma). Before appellants could be required to begin to deliver the cargo to the vessel at Port Angeles, it was the duty of appellee to satisfy appellants, in the manner agreed upon by clause J, that she was in proper condition *then*, when tendered for loading, and *there*, at the agreed loading place.

Now on October 15, 1917, the master handed to the loading mill a surveyor's certificate; but the certificate so presented was not of the kind required by the charter-party, inasmuch as it did not show that the vessel, when tendered as *ready* for loading, *was then in fact*, "in proper condition for the voyage", which means that she was *then* "in every way fitted and provided for such a voyage" (Charter-party, Clause A). It appears without controversy that Captain Gibbs, the Marine Surveyor, did *not* survey the schooner after her arrival at the loading place (395); that, in fact, he had not seen her for two months, since the month of August, when he examined her at the Seaborn Yards where she was built. It also appears that, after Captain Gibbs' survey, the windlass on the new boat had proved defective and had to be thereafter repaired (159); also that various other work was done on the vessel in anticipation of her voyage. As far as the evidence shows, this actual unseaworthiness of the vessel may have continued until the first part of October

(160); at any rate there was no survey between the dates of the admitted repairs and the 18th of October.

The surveyor's certificate does not show what was the condition of the vessel on the day when it was tendered to charterer; it does not show that the "Levi W. Ostrander" *was,* on *October 15th,* ready to receive her cargo, or "in proper condition for the voyage".

No duty of the charterer to load the vessel matured until the following conditions were complied with:

(1) That she was in fact seaworthy at Port Angeles;

(2) That she was surveyed at Port Angeles by a Marine Surveyor of the San Francisco Board of Underwriters;

(3) That the surveyor had issued a certificate showing that she was then seaworthy;

(4) That appellee had furnished such a certificate to appellants.

Then, *and only* then, was it agreed that charterer "doth engage to furnish to said vessel * * * a full cargo of sawn lumber". It is proved that conditions (2), (3) and (4) were *not* complied with. Appellants were, therefore, under no legal obligation to begin loading even on October 15th and cannot be charged with laydays starting as of that day.

b. *Because appellant had a contingent right to cancel the charter up to and including October 18th.*

Appellant cannot be charged with laydays before the proper certificate of the Marine Surveyor was furnished by the vessel, for another reason:

Clause J of the charter-party conveys to the charterer a valuable *option,* becoming effective in case this new vessel should fail to pass a satisfactory survey and be detained more than ten days for repairs, viz., the option to cancel the charter in such an event (13). The owner could not deprive the charterer of this agreed option by simply failing to furnish the required certificate. The charterer had a contingent right of cancellation, and therefore the absolute right to be furnished with the certificate. Assuming that the schooner was physically seaworthy and ready to load on October 15th, still the charterer was not bound to load *until he had received the proof, stipulated by the parties,* of the newly built schooner's suitability to receive a cargo of lumber to be carried to South Africa from Port Angeles. In fact, he never did receive this proof.

Recapitulation: Appellants are not to be charged with laydays as commencing *before* October 18th, at 1:00 P. M. for the reasons mentioned, viz.:

(a) That appellee ordered his captain not to load before that date.

(b) That no certificate of survey was given before that date.

(c) That proper notice of readiness can be given only after the vessel *is* ready; a notice that she *will be* ready at a later time specified is not a proper notice.

D. Appellants are not chargeable with laydays as from October 18th.

1. Special agreement between the mill and the captain.

Actual loading began on *October 18th, at 1 P .M.*

The condition precedent that appellee furnish the agreed Certificate of seaworthiness was operative until October 18th in favor of appellants; but it is admitted that the furnishing of the cargo and beginning of the loading constitute a waiver of this condition. Nevertheless, the appellants are not to be charged with laydays as commencing *on* October 18th, for the reasons now to be discussed. The first of these reasons is that the parties made a special agreement to that effect. The mill notified appellee, before the actual loading commenced, that it could not, under prevailing circumstances, agree to deliver cargo to the vessel "as fast as vessel can receive it". The mill, under the charter-party, had a right to take this position.

On October 15, 1917, Puget Sound Mill and Timber Company notified the captain of the vessel, after receiving his notice, by letter, that

> "we will not accept any notice at any time in regard to the commencement of laydays. We wish to advise you that we have had a strike at our plant which stopped operations in our sawmill and logging camps for about two months, and we have not up to present time been able to resume operations to full capacity the same as before the strike.
>
> Should you, however, wish to commence loading, you may do so, providing you waive all claim for demurrage. *We agree to furnish you lumber as fast as we possibily can.*"
>
> Respondent's Exhibit "A-4".

On October 16, 1917, the mill notified the captain as follows:

> "'In reference to the loading of your vessel now at our wharf, it is agreeable with us you commence

loading now or at any time your vessel is ready to receive cargo, and *we will furnish the cargo just as rapidly as* POSSIBLE UNDER EXISTING CONDITIONS. We will, however, on the completion of the loading of your vessel, insist upon a demurrage release and will dispute any claim you make for demurrage."

Respondent's Exhibit "A-5".

The captain answered on the same day:

"In answer to your letter of even date I wish to state that *I have orders from the owners in Seattle to await instructions from them before commencing to load.*"

Respondent's Exhibit "A-6".

On October 17 or 18, 1917, the captain advised as follows:

"The Puget Sound Mills and Timber Co.,
Port Angeles, Wash.
Gentlemen:
This is to notify you that the Schr. Levi W. Ostrander will be ready to receive cargo today at 1 P. M. *I also* AGREE UNDER EXISTING CONDITIONS *to sign a demurrage release to your mill upon completion of cargo.*

C. Henningson,
Master."

Respondent's Exhibit "A-7".

There was, therefore, a clear understanding between the respective agents of the parties to this suit that the beginning of loading on October 18th was not intended to set the laydays running against the charterer; that, on the contrary, the mill would not and could *not,* "under existing conditions," deliver the cargo "as vessel can receive it"; that the mill should

furnish the cargo as *rapidly as possible* "under existing conditions", and that, if the mill did so furnish the cargo, the master agreed, "under existing conditions", to waive any demurrage claim against the mill upon completion of the cargo.

The difficulty of finding a fixed day on which the laydays would begin under this charter-party is well illustrated by the efforts of the lower court in this direction.

In the "decision" the court says:

> "The undertaking on the part of the charterer to furnish cargo *from this day* becomes an absolute undertaking" (441).

In an effort to determine to what day "this day" refers, we meet with numerous dates mentioned in the part of the opinion immediately preceding this conclusion; but we are unable to determine to which of these dates the conclusion is intended to apply. From the fact that the decree made by the court awards demurrage for the period between October 15, 1917, and December 14, 1917 (447), no intelligent inference can be drawn. Nor could an inference be drawn from the previous conclusion of the court that

> "It appears conclusively established that on October 16th respondents began to furnish cargo to libelant" (440).

Appellee will probably attack this finding with as much vigor as we are inclined to devote to it; for it cannot be denied that all the evidence shows clearly and conclusively, that the mill did *not* begin to load until October 18th.

The inability of the lower court to determine on and from what exact day the charterer should be charged with laydays running against him is the perfectly natural result of the fact that, under the charter-agreement, it was provided that there should be *no exact day.*

2. The agreement between the mill and the captain that the loading should be accomplished in a reasonable number of days, beginning with October 18th, accords with the charter-party agreement.

1. *The agreement was a "Reasonable-time charter-party".*

(1) On May 15, 1917, when the charter-party was made, the vessel was building in appellee's shipyard. No agreement was made as to when she should be completed, or when she should proceed to her loading place or when she should be loaded. On May 23d appellee wrote to appellant: "According to present calculations the schooner *should be* ready for cargo about the middle of July"; on June 28th he writes: "She is *expected to be launched* between the 10th and 20th of July"; on August 13th he wires: "*Will be* ready for cargo by August twenty-fifth." Under such conditions of uncertainty the charterer would naturally be disinclined to bind himself to have his cargo ready, or to make himself liable for demurrage, upon the lapse of any definite time. He would naturally prefer to leave the beginning and duration of laydays undetermined, and dependent upon his reasonable conduct under all the uncertain circumstaces that might develop before the new vessel should be in condition to take her cargo on board.

(2) To meet this situation, the parties struck out of their charter-party the clause in ordinary use whenever a contract to load in a fixed time is intended. This deleted clause reads as follows:

> "The party of the second part shall be allowed for loading and discharging said vessel at the respective ports aforesaid laydays as follows,..... feet board.....measure per working day for loading, *to commence* twenty-four hours after vessel is at loading place designated by charterers or their agents, her inward cargo and/or unnecessary ballast discharged, *and she is ready to receive cargo* and Captain has notified them in writing to that effect."

By striking out this clause, the parties eliminated any express agreement as to, *first,* when loading should commence, and *second,* at what rate it should proceed; they made expressly, out of a form of charter-party designed to prescribe a fixed time for loading, a charter-party omitting intentionally any express agreement as to when the loading of the cargo should commence, and how many days the charterer should have for the purpose.

2. *Legal effect of charter-party as to charterer's duty.*

The legal effect of such a charter-party is defined by *Carver, Carriage by Sea,* Sec. 610, as follows:

> "And again, the time is often *left wholly undefined,* the charter being silent about it. In such case *the charterer undertakes no definite obligations in the matter;* but, as in other cases where the contract is silent, the law requires him to perform his part in the work with diligence."

And in Sec. 611:

> "* * * The question whether the charterer has been duly diligent *must be determined by reference to the conditions under which he has actually worked.*"

And in Sec. 615:

> "The contract implied by law in those circumstances is that the merchant and shipowner shall each use reasonable despatch in performing his part." * * * "The true view is, that the despatch required from the parties is that *which can reasonably be expected from them under the actual circumstances* which exist at the time of performance."

This statement of the law is supported by the English authorities.

The law is the same in the United States:

In *Empire Transp. Co. v. Philadelphia Co.* 77 Fed. 919, the Circuit Court of Appeals for the Eighth Circuit held:

(1) Where the charter is silent as to the time of unloading, there is an implied contract to discharge the vessel within a reasonable time.

(2) This contract is, in effect, an agreement to discharge her with reasonable diligence; that is, in such time as *is reasonable under all the existing circumstances, ordinary* AND EXTRAORDINARY, which legitimately bear upon that question at the time of her discharge.

(3) The burden is on him who seeks to recover damages for the delay of a vessel, under such a contract, to prove that the charterer did not exercise

reasonable diligence to discharge her under the actual circumstances of the particular case; but proof that the vessel was delayed in unloading beyond the customary time for discharging such cargoes at the port of her delivery throws upon the charterer the burden of excusing the delay by proof of the actual circumstances of the delivery and his diligence thereunder.

These principles, in their nature, apply with equal force to the charterer's duty of *loading* a vessel.

In *The Richland Queen*, 254 Fed. 668, the Circuit Court of Appeals for the Second Circuit held:

(1) Under a dry dock company's contract to repair a vessel, where no time was specified, the repairs are to be made within a reasonable time; and where a *strike* occurred among the operatives of the dock company, which delayed the work, the question is, *whether the delay is reasonable or not, in view of the circumstances at the time the contract was being performed.*

(2) Where, after a dry dock company had contracted to repair a vessel, its employees demanded shorter working hours, and struck because their demand was refused, *this was an excuse for delay in completing the repairs,* although the strike was not accompanied by violence, the delay being reasonable in view of the strike, and there being no difference in principle between peaceable and violent strikes.

No distinction can be made, as to the ruling principles, between a contract to repair a vessel, as in the case of the "Richland Queen", and a contract to furnish cargo to a vessel. In the case at bar, as in the

case cited, a strike occurred among the operatives who were to supply the cargo, and the work of dispatching the vessel was delayed in consequence of that strike. The question is: Was the period of loading the vessel, between October 18th and November 24th, a reasonable period in view of this strike and the other conditions prevailing? Was this vessel, in view of these conditions, loaded by the mill with reasonable diligence? The question is *not*, how quickly the cargo could have been supplied under normal conditions. The finding of the District Court, that "the vessel could readily have been loaded in fourteen days" is predicated upon the assumption of normal conditions; hence its application to the facts of this case under a "reasonable time charter" is erroneous.

3. *The duty of reasonable diligence governs appellant in furnishing the cargo.*

a. Beginning of Laydays Was Agreed to Be a Day Reasonable Under All the Circumstances.

This question applies, in the instant case, not merely to the duty of *loading* a ready cargo, but also to the duty of getting the cargo ready. It was so specially agreed between mill and master, after the latter knew that a full cargo was not ready and had appreciated the extraordinary nature of "existing conditions". When the charter was signed, the owner of the vessel knew that the cargo was not in existence; that the charterer was not the manufacturer of the cargo, but would have to acquire it from one of the sawmills on Puget Sound. On the other hand, the charterer could not foretell when the vessel, then building, could be

at her loading place, ready for the voyage. Therefore, the contract did not provide that appellants would furnish the cargo as soon as the vessel was constructed and completed, nor was any express time stipulated in the charter-party, at which appellants must have the cargo ready at the loading place. On the contrary, the deletion from the charter-party of the clause ordinarily used for this very purpose evidences the positive intention not to fix the time. Hence the principle applies that it was the duty of appellants to have the cargo ready for the vessel within a time reasonable under the circumstances, taking into consideration the circumstances as they actually existed. If there had been a strike at appellee's shipyard, the construction of his vessel might have been delayed until November or December, and appellants' corresponding duty to have the cargo ready would not have existed until then. As the vessel was not ready at the loading place until October 18th, the question is, whether the time when, and the rate at which, appellants furnished the cargo were reasonable, considering the strikes that had arisen, after the making of the contract, in the lumber camps, the sawmills and loading places before this vessel was finished, and considering the effects of these strikes, also considering the war conditions, the consequent enforcement of government control of the lumber industry on Puget Sound, and all the other circumstances surrounding the vessel and the mill. Not merely the period allowed for laydays, but also *the time when the loading should commence* are stricken out of the charter-party. The result is that the *day* when time should commence to run as a charge against appellants, and

consequently the day when the cargo was to be ready for loading, are not fixed, but are agreed to be dependent upon all the surrounding circumstances.

This contention is consistent with the principle that, in an ordinary charter-party, the charterer has an absolute duty to have the cargo ready whenever the vessel is ready; for in such a charter-party the beginning of the laydays is fixed with reference to or made dependent upon the readiness of the vessel to receive cargo. In the charter-party in suit, however, the provision that the laydays begin 24 hours after the vessel is ready is intentionally deleted, the effect being that the beginning of the laydays is not made dependent upon the uncertainty of the completion and readiness of a vessel then building, but is agreed to be a time reasonable under all circumstances. The charterer's duty was to have the cargo ready within a period of time which, under all the circumstances developing after the making of the charter-party, would be considered reasonable, and to load it accordingly.

The captain's agreement with the mill, waiving demurrage under the circumstances, was in strict accord with the agreement made by his owner in the charter-party.

b. Appellee's Knowledge That Cargo Was to Be Provided From a Particular Source and Therefore Subject to Delays by Which the Procuring of the Cargo From That Place Might Be Delayed.

That appellants were entitled to a reasonable time

for the purpose of providing the cargo follows also from the following considerations:

The charter-party provided, in effect, that the lumber cargo was to be provided by the charterer from the Puget Sound Mills & Timber Company at Port Angeles. The shipowner knew that the cargo was to be sawn by the mill, and that, before sawn, logs must be procured and sent from lumber camps, and that the procuring of a cargo of sawn lumber might be delayed by industrial troubles interfering with the cutting and sending of the logs, and their sawing in the mill, especially in view of the disturbed conditions normally incident to war, and of the uncertainty as to the time of completion of a vessel not yet built. The parties to this contract, on account of war recently declared between this country and the Central Powers, could reasonably foresee what in fact happened, viz.: that the war needs of the nation would cause a general commandeering, by the Government, of the resources of the lumber industry, of the plants of the lumber mills, and in particular of the supply and production of the Puget Sound Mills & Timber Company and its sawmill. They could also foresee that a ship in course of construction might be delayed in its construction by the extraordinary conditions introduced by a state of war, or might, when completed, be used by the Government for its paramount necessities. It was, therefore, as much for the interest of the shipowner as it was for the interest of the charterer, that the time when the vessel should be ready for the cargo, and the cargo ready for the vessel, should be left open in their con-

tract, and dependent upon the reasonable diligence of the parties in the uncertain conditions. The principle applies, which is stated by *Carver* as follows:

> "The charterer cannot be assumed to have the cargo ready, if it is expressly to be provided *from a particular place* and the charter has been made in view of circumstances by which, as the parties know, the procuring of a cargo from the place may be delayed * * *. This principle has been extended to cases in which delay has arisen, not from causes existing at the time of the contract, but from causes which it was known *might arise*" (*Carver, Carriage by Sea,* Sec. 254).
>
> "If, in such a case, *no arrangement is made as to the time* in which the loading is to be done, the charter will be allowed a *reasonable time for geting the cargo,* having regard to the known sources of delay."

In the case of *Jones Limited v. Green & Co.,* 9 Asp. 600 (Court of Appeal), Vaughn, L. J., said:

> "It is a case in which *the source from which the* (sawn lumber) *was to come was expressly defined.* When that is so, I think it is impossible to lay down an absolute rule that the charterer undertakes an unqualified obligation to have the cargo ready whenever it may be reasonably expected that there may be a berth for the ship * * *. It may be so sometimes, but it is impossible to say that it must be so * * *. I take it that one cannot exclude the knowledge of the parties in the consideration of this matter, because, after all, what we have to consider here is, *what was a reasonable time either for the provision of the cargo or for the commencement of the loading.*"

E. The District Court was therefore in error when it found that "It was the duty of respondents to furnish cargo as fast as it could be loaded, unless excused by the cesser clause, which clause does not excuse in this case".

The reference to the Cesser Clause in this connection is perplexing. We did not invoke its protection at any time or in any manner. We admit that it could not excuse appellants from furnishing the cargo in the manner or at the rate agreed by the charter-party. But we have shown that it was not the duty of appellants, under its contract, "to furnish the cargo as fast as it could be loaded". Their duty was to use reasonable diligence in providing the cargo under all the existing conditions. In order to determine, whether the acts of appellants in this respect were reasonable, all the circumstances surrounding the mill of the Puget Sound Mills & Timber Company, in October and November, 1917, must be given consideration.

We do not think appellee's proof sufficient to justify the finding of the court that this new and untried schooner could have been loaded in fourteen days, but appreciate that, under the rule of this court, we cannot be reasonably successful in overcoming this finding. The evidence shows, however, by clear preponderance, that any delay in the loading is excused by the actual circumstances surrounding the loading mill, and that appellants and their agents were reasonably diligent.

F. Appellants did in fact fulfill their obligations under the charter.

The principal obstacle to a more prompt loading of the vessel were:

(1) The effect of a general strike in the logging camps and lumber mills on Puget Sound,

(2) The requirements and orders of the U. S. Government in consequence of war needs.

1. The strike in the logging camps and lumber mills.

The evidence shows that the labor troubles at the lumber camps and mills of the Puget Sound district were the most serious in the history of the Northwest (testimony of Major Griggs, 277, 280-281, 284, 286, 287; of A. H. Landrun, 288, 289, 290; John Nearborne, 294, 296; Lee Dowd, 297; G. C. Thompson, 300, 301). Robert P. Allen, secretary and manager of the West Coast Lumberman's Association, *called by appellee as a witness,* testified that, as a result of the strike, the production of lumber dropped and "has never been normal since that time, or approximately normal" (340-341). The condition in the mill which loaded the cargo in the instant case is shown by the testimony of A. A. Scott, its general manager:

> "The COURT. You did not operate the mills from July to September?"
>
> "The WITNESS. We did not operate them" (183).
>
> "When the mill reopened on September 6th, it operated 'about 25% of its normal capacity'" (184).
>
> "We gradually brought up the production, possibly in 10 days afterward we were up to 30%, and kept on bringing it up until along in November, the latter part of November and the first of December we were, probably, up to 100% production" (184).
>
> "We never got back to the normal capacity of the mill" (204).

"Very few of our old men came back, and we had to break in new men, green hands, and we could not get efficiency out of these men" (184).

"Q. And what was the effect on the logging camps, of that strike?"

"A. It stopped the production of logs for a period of about eight weeks. We were then able to start what we call one side in our camp. Normally we operate six sides" (184).

"From July 16th until September 6th they were closed down. They did not haul a log" (198).

When the abnormal conditions at the loading mill became apparent, appellants made an effort to meet appellee's wish to cancel the charter by seeking a release from their contractual obligations to the South African buyers of the cargo; but the latter refused to release them, and they became absolutely bound to deliver the cargo out of this vessel. They thereupon used all reasonable endeavors to dispatch the vessel.

On October 18th, at 1:00 P. M., appellants and the mill were entitled to the benefit of a reasonable time for loading, under the circumstances existing at the mill. The general strike in the logging camps and lumber mills of Puget Sound, disclosed by the evidence, commenced on July 16th, and its effects were felt in the mill at Port Angeles for the rest of the year. From July 16th to September 6th the logging camps supplying the cargo of the vessel, and the mill, were entirely closed down. "They did not haul a log". After September 6th the men commenced to come back gradually, but the mill did not acquire approximately normal efficiency until the end of November. The efficiency of a sawmill is seriously impaired by the absence of a

single sawyer. The strike affected the furnishing of the cargo, on account of the crippled condition of the mill, while the loading of the vessel was going on. The District Court found that "the strike did not materially interfere with the output of the mills on Puget Sound after the first week in Sepember". This finding, we think, is not supported by the evidence; but at any rate it does not preclude this court, under its familiar rule respecting findings of fact, from finding that the strike did materially interfere with the output of the particular mill at Port Angeles which is involved in the instant case. The evidence shows clearly that the crippled condition of the mill at Port Angeles, resulting from the strike and aggravated by the war requirements of the government, was the cause of the delay in loading, in spite of all efforts to overcome the handicap.

The loading of the lumber on appellee's vessel was not in any way delayed by reason of the loading of other vessels arriving at the wharf of the Puget Sound Mill and Timber Company (185), nor did the cutting of cargoes for other vessels interfere with or delay the cutting of the cargo for the "Levi W. Ostrander" (186). The "Ostrander" was loading export lumber, while "the other vessels were loading coastwise California lumber—an entirely different grade" (193).

2. Commandeering of mill by Government.

An important element to be considered in determining the question, whether appellants and the mill used reasonable diligence in loading the vessel is the order

of the United States Government, received on September 7th, which interfered with the normal conditions of cutting and loading, and produced delay in furnishing the cargo to the vessel.

> "We received a telegram from the Secretary of War on September 7th, practically commandeering the mill; ordering to cut spruce immediately, and to notify him that day and to start cutting spruce and continue to do so for airplane purposes * * *. We could not cut fir logs for the 'Ostrander' if we were obliged to cut spruce logs for the government" (195).

The mill was

> "practically commandeered * * *. It lasted until the armistice was signed. Our mill was in charge of soldiers in 1918 entirely. * * * We were commandeered by the Secretary of War and by General Diske, by the Fir Production Board" (217).

The manager of the mill testified that the mill *did all they could,* under the circumstances, to furnish the cargo promptly.

> "We gave the vessel all the lumber we could possibly cut under our capacity.
>
> "Q. What was your interest in that regard or the mill's interest?
>
> "A. To get rid of the vessel and *give her the best possible dispatch we can;* the quicker we can get them away from the dock, the better off we are" (192).

The evidence thus shows positively that appellants and the loading mill complied with their duty to furnish the cargo with reasonable diligence and to consume no more than a reasonable time in the work of doing so. It is proper to keep in mind that in this

case appellants' and their agents' duty coincided with their self-interest, which was to deliver this cargo to its purchasers in South Africa as promptly as possible and thereby earn the profits of the sale. The evidence shows that appellants were as anxious as appellee to avoid delay and that they used every reasonable effort to complete the transaction.

II. ASSUMING THAT THE CHARTER IMPOSED UPON APPELLANTS THE DUTY TO FURNISH CARGO AS FAST AS VESSEL COULD RECEIVE IT, THIS DUTY IS SUBJECT TO THE EXCEPTIONS OF THE CHARTER-PARTY.

We are not attempting to get away from the principle that, under this charter-party, the undertaking of the appellants to furnish a cargo was as absolute as the undertaking of the appellee to furnish the ship after she was constructed.

We contend, however, that under this charter-party —no time being fixed when appellee was to furnish the ship and appellants were to furnish the cargo—the future *time* when ship and cargo should meet so that the "laydays" provided in the charter-party should begin to run was made dependent upon the circumstances surrounding both parties, and was subject to the exceptions of the charter-party. Admitting that the vessel must be constructed and tendered, *absolutely, within a reasonable time after the date of the charter-party contract;* and that reciprocally trees must be cut in the forest, transported to the mill, and made into

the sawn lumber to constitute the cargo, *absolutely, within a reasonable time after the date of the charter-contract;* we nevertheless contend that the intention of the parties to this charter-party was that, in case the ship was ready for the cargo on a particular day when the cargo was not yet ready, or in case the cargo was ready for the ship on a particular day when the ship was not yet ready, the delinquent party should be relieved from liability for damages if his unreadiness was caused by strikes, or hindrances beyond the control of either party to the agreement. The duty to furnish the ship, or the cargo, respectively, was absolute; but the *time* when these respective duties were to be performed was relative and to be determined in the light of the agreed exceptions.

These exceptions: "*Strikes,* lockouts, accidents on railways and/or docks and/or wharves, or *any other hindrances beyond the control* of either party to this agreement or their agents", are "*always* mutually excepted" and control all the obligations of either party to the agreement, among others the obligation of the charterer,

> "to *furnish* to said vessel, at designated loading place, a full cargo of sawn-lumber and/or timber".

To "furnish" means to provide, to supply, to procure; to look out for in advance; to procure beforehand; to get, collect or make ready for future use; to prepare.

Cook v. State, 46 S. E. 64, 65;
Ware v. Gay, 28 Mass. 106, 109.

The procuring and preparing of this cargo includes the cutting of the logs in the forest, transporting them from the logging camps to the mill, sawing the logs in the mill and then delivering the sawn lumber to the ship. These acts appellants engaged to do absolutely within a reasonable time, but they undertook to furnish the sawn lumber to the ship at any particular time only subject to the protection of the strike, hindrance and other exceptions. These are "*always* mutually excepted".

The "*freighting*" of the vessel is agreed to be subject to the exceptions which operate in favor of either party from the time when the contract is made and cover every obligation which either party assumes. If the owner of the vessel is, by *strikes* or "any hindrances beyond control", prevented from performing any of his obligations, he is excused; reciprocally the charterer is excused, if any of these exceptions prevent performance of his obligations. Both parties understand from the start that this cargo is not one which can be supplied in the open market on short notice, but that the charterer must procure it from the lumber merchant who specially prepares it for the special voyage. Both parties understand that an export cargo of Douglas fir lumber of agreed specifications, for the South African trade, must be first procured from and prepared by the sawmill from which the charterer has ordered it.

The obligation of appellants was to furnish this cargo, with the proviso that if, at the time when the vessel should report ready, the cargo was unprepared

by reason of *strikes,* any other *hindrances* beyond their control, or any of the other exceptions, the charterers should not be liable for the delay. Had the cargo been prevented from being ready for loading by "*accidents on railways*" connecting the logging camps with the mill, appellants would certainly not have been liable for the delay. Many contingencies may arise between the cutting of the trees in the forest and the loading into the vessel of the lumber sawn out of the trees; it is, therefore, natural that the charterer would protect himself by exceptive clauses against such contingencies.

The principle governing the ordinary contract of charter, imposing upon charterer the absolute duty to furnish the stipulated cargo whenever the ship reports ready, is predicated upon express agreements found in such a contract. Necessarily, in cases where the charterer agrees to load the cargo *whenever the ship shall be ready to receive it,* the *providing* of the cargo is not a charter obligation and is therefore not subject to the charter exceptions. *But the instant case is different.* The charterer, mindful of the contingencies above mentioned, does not agree to load the ship whenever she is ready or at any fixed time.

The case falls within the class of those where the scope of the exceptions apply "to the work of bringing the goods from the places at which they are produced to the spot at which the actual loading is done" (*Carver,* sec. 257a).

The strike in the lumber camps and sawmills about Puget Sound was also a "hindrance" within the scope

of that term in the exception clause. Another hindrance beyond charterer's control was the commandeering of the loading mill; for unless a distinction could be drawn between "*any* other hindrances beyond the control of either party" and "any other hindrances of *what kind soever* beyond their control", the case of *Larsen v. Sylvester,* 11 Asp. 78 (House of Lords), decides that the word cannot be restricted to hindrances *ejusdem generis* with the words previously enumerated. Hence the "commandeering" of the mill must be considered as one of the elements determining the question, whether appellant has fulfilled the assumed relative obligation to deliver the cargo as fast as vessel could receive it.

To summarize, the clause of the charter-party, providing for the obligation of the charterer to "furnish" a cargo to the vessel, is part of the contract whereby the owner "agrees on the freighting", subject to contingencies "always mutually excepted". Where, as here, strikes beyond the control of either party, and other hindrances beyond their control, such as the overpowering necessities of the government, caused a delay in the dispatching of the vessel, in spite of the reasonable diligence exercised by appellants to prevent or minimize the delay, appellants are relieved from liability.

III. THE CAPTAIN'S RELEASE IS BINDING UPON APPELLEE AND CONSTITUTES A DEFENSE TO APPELLEE'S CLAIM FOR DEMURRAGE.

On October 15th the mill company delivered to the captain of the vessel a letter saying:

> "We will, however, on the completion of the loading of your vessel, insist upon a demurrage release, and will dispute any claim you make for demurrage."

On October 18th the captain delivered to the mill company a letter saying:

> "This is to notify you that the Sch. 'Levi W. Ostrander' will be ready to receive cargo to-day at 1 p. m. I also *agree under existing conditions to sign a demurrage release to your mill upon completion of cargo.*"

On the same day the captain wrote to appellee:

> "According to instructions in your telegram received last night I again tendered a notice to the Puget Sound Mills and Timber Company stating that the Sch. 'Levi W. Ostrander' was ready to receive lumber, and that *upon completion of the cargo I would sign a demurrage release for account of the mill under existing conditions* * * *."

With this understanding the loading commenced. At this time appellee and his captain were in close communication with one another, and it is clear that the captain's agreements were binding upon appellee. At any rate appellee knew on October 18th, or the day following, that his master had agreed to sign a demurrage release upon completion of the cargo; if he had desired to repudiate such an agreement, he would have given prompt notice of such desire to appellants; the fact that he gave no such notice shows that the captain acted with full authority from appellee who practically stood at his captain's elbow during this period. Both appellee and his captain then recognized that the agreement with appellants required the latter to

furnish the cargo as promptly as the conditions then existing permitted under the assumption of reasonable diligence on the part of appellants, but that the "existing conditions" were not such as to make appellants liable for the delay in furnishing and loading the cargo. The agreement to release appellants had force not merely as a discharge of appellee's claim, but also as an *admission by conduct* that the charter-agreement was not intended to impose upon appellants an absolute duty to furnish the full cargo whenever appellee's vessel should be constructed and should report ready for loading.

IV. THE DEMURRAGE CLAUSE IN THE CHARTER-PARTY DOES NOT APPLY TO LOADING, AND THEREFORE, APPELLEE HAS NO CLAIM FOR DEMURRAGE.

The only clauses in the charter-party touching upon the subject of demurrage were the following:

> "Cargo to be received at port of discharge as fast as vessel can deliver at such wharf, dock or place as charterer or their agents shall designate.
>
> For each and every day's detention by default of said party of the second part, or their agents, two hundred and fifty dollars ($250) per day shall be paid * * *" (13).

As all provisions for the beginning and duration of laydays at the port of loading are struck out of the charter-party, and as, consequently, no demurrage at the loading place is contemplated, the agreed $250.00 per day can apply only to detention at the port of discharge.

Such a construction is reasonable in the light of the circumstances of this case. The uncertainty as to the time when the prospective vessel would be ready for the charterers' use in carrying their cargo to South Africa, and the uncertainty as to the time when this newly built vessel would satisfy the requirements of the Marine Surveyor, would naturally induce the charterers to refrain from binding themselves to pay demurrage at a fixed rate per day beginning at any fixed time.

V. THE DELAY IN LOADING WAS NOT CAUSED BY DEFAULT OF APPELLANTS OR THEIR AGENTS.

By the terms of this charter-party it is only for "detention *by default of*" appellants or their agents that they agree to pay the amount specified for each day in the charter (13). A detention caused, not by any act, or default of the charterers, but wholly by extraordinary war conditions, such as the commandeering of the sawmill by the Government, and by general strikes, directly affecting the supply and operation of the loading mill, and which made the prompter furnishing of the cargo impossible, cannot be considered as caused by "default" of appellants, in any just sense.

Appellee has the burden of proving appellants' default.

In this case the delivery of the cargo to the ship was retarded by the direct and immediate vis-major of the government, the commandeering of the mill for

war purposes, and by the nefarious activities of lawless bodies causing discontent and strikes in labor ranks. This was not a "default" within the meaning of the charter-party. The action of the government was a "superior force, acting directly upon the loading of the cargo"; "a direct and immediate vis-major", and the ruinous strike prevailing, with its after-effects, was an interruption "not occurring through the connivance or fault of the charterers", within the definitions of the terms in the case of *Crossmann v. Burrill*, 179 U. S. 100, 113.

Hence the detention between October 18th and November 24th was not caused by default of appellants, and did not render them responsible for demurrage under this charter-party.

THIRD: APPELLEE IS NOT ENTITLED TO DEMURRAGE FOR ANY PERIOD AFTER NOVEMBER 24th, WHEN THE SCHOONER COMPLETED HER LOADING.

Appellee's claim, as applied to the period after loading, is stated in Article V of the libel as follows (7):

> First: "That by the terms of said charter-party libelant *was given a lien on said cargo* for all demurrage accruing to the libelant under the terms of said charter-party, and is entitled to a lien thereon for any other or further demurrage sustained by libelant by the further detention of said vessel by the fault of said respondents".
>
> Second: "That *by the refusal on the part of said respondents to pay said demurrage* said vessel has already been detained five additional days, and libelants claim and demand of said respondents

and as against said cargo additional demurrage therefore in the sum of twelve hundred and fifty dollars ($1250.00) and a like amount of two hundred and fifty dollars ($250.00) per day for each day's detention from and after this date".

It should always be kept in mind that, to make appellants liable, appellee must show that his vessel was detained by their "default".

Instead of showing that the vessel was *detained by the default of appellants,* appellee offers to show that she was detained by appellants' refusal to pay a claim urged by appellee against them. We are at once met with the puzzling question: How could a refusal on the part of A to pay an alleged claim to B be a default, on the part of A, such as to be considered the legal cause of the detention of B's ship? How can the movements of B's ship be affected by any claim which B may have against A?

There are numerous grounds, on which appellees claim to any demurrage after November 24th must fail, and, in addition to these grounds, there are special grounds on which the claim for the period after November 30th must fail. We shall now discuss these separately.

I. AS TO THE WHOLE PERIOD FROM NOVEMBER 24th TO DECEMBER 14th.

With respect to this period we contend:

A. That the detention of the vessel was caused by no default of appellants or their agents.

B. Even if appellants' default had been one of the causes, appellants would not be liable for demurrage, because appellee's act was one of the causes.

A. No default on the part of the appellants caused any detention.

1. The cause of this detention was not that alleged in the libel.

The libel claims for five days' detention and states the cause of the detention of the ship to be "the *refusal* on the part of said respondent *to pay* said demurrage" (meaning $19,000 claimed for alleged detention during loading). Appellee had then full possession of his ship, had his own master on board, and further had on board the amplest security for the payment of any claim that he could prove to be just. Appellants had no legal means of preventing the exercise of appellee's full control over his ship, and did not use or attempt to use any means whereby the free departure of the vessel was hindered or delayed. It would be difficult to understand how, in the very nature of things, appellants *could* have stopped a ship by the passive method of refusing to pay $19,000 to the owner; but it is certain that they did not in fact detain the ship by this or any other method.

2. The cause of this detention was not that claimed by proctor at trial.

On the trial of the cause proctor for appellee, referring to his claim for demurrage after November 24th, and to the detention of the vessel by the War Trade Board, stated:

> "As a matter of fact, I think the only thing that could be said was that we did not get the boat away in time, and that was the reason we were held, *but we have not made any claim for that delay. Our claim for delay consists of five days after November 24th,* which five days was *consumed in this debate about the freight and the bill of lading, but we are making no claim for the subsequent time that the Government would not allow us to proceed*" (146).

The following deductions are inevitable from this statement:

First: That appellee admitted that he had no claim beyond the five days.

Second: That if he ever had any such claim, he waived it.

Third: That appellants had a right to rely upon such admission and waiver (abundantly supported by the allegations in the libel), and to forego any defense which they had to any larger claim.

Fourth: That the court could make no award for demurrage beyond the five days claimed.

However, the decree awards demurrage after November 24th for twenty days. The award of demurrage for fifteen days, amounting to $3750, is in conflict with counsel's admissions and waiver, both in the pleadings and at the trial, and therefore erroneous. This leaves a possible five days of demurrage after November 24th,

> "Which five days was consumed in this debate about the freight and bill of lading";

but even with reference to these days, the court is clearly in error. It is incumbent upon appellee to show

that, during these five days, the vessel was detained by the default of appellants. Counsel states that she was detained by a debate, meaning a controversy that had arisen between appellee and appellants. It is difficult to understand that this controversy could not have been carried on with perfect success without detaining the vessel. She was under appellee's individual possession and control; no one could detain her except one who took possession of her, and appellants did not interfere with her possession or free movements. Assuming, without admitting, that appellants' position in the "debate" was untenable, such assumed error caused no delay to the vessel. Even if it had done so, this would not be a "default" such as would make appellants liable for demurrage.

3. The cause of this detention was not that alleged in Court's Findings.

The District Court awarded twenty days' demurrage ($5000) for the period after loading, "because of the failure of the mill to promptly furnish specifications of cargo, and delay because of refusal of the master to sign bills of lading showing freight was paid, when in fact it was not paid, and delay caused by demand for waiver of demurrage" (445-446).

When this award was made, the court had evidently forgotten what it had said at the beginning of the "decision", viz.:

> "That libelant seeks to recover the further sum of $1250 for five days' additional detention of said vessel" (437).

Apart from other objections, the "Decision" shows on its face that the court awarded $3750 in excess of what the court decided that the libelant sought to recover.

As to the reasons given for the award, we submit that the evidence does not support its findings; but *assuming their correctness,* they are obviously insufficient to charge appellants with liability for this demurrage claim. First: An assumed failure of the mill to promptly furnish specification of cargo could not, and did not, cause a detention of the vessel. The vessel does not need such specifications to obtain her clearance; she could go freely on her way and leave the specifications behind. Second: An alleged delay because of an assumed "refusal of the master to sign bills of lading showing freight was paid, when in fact it was not paid", could not be construed as a "detention by default of" appellants; for how could the refusal of the master to sign a particular form of bill of lading presented by the shipper, after the cargo is on board, be effective as a cause of detention of the vessel? The Harter Act, Sec. 4, made it the master's duty to issue the bill of lading. When he performed this statutory duty, he could at once proceed on the voyage, and his refusal or neglect to perform this duty would not have been a default by appellants. Had appellants demanded improper bills of lading—which is denied—the master was at liberty to refuse to sign them, to issue his own form of bill of lading, and to depart with his vessel. None of these assumed acts

were, or could have been, the cause of the detention of the vessel.

Besides, appellee had no right to detain his vessel, at appellants expense, until the freight was paid; for the freight was not prepayable under the charter-party. Appellee was fully protected by his claim for the freight against appellants in personam, also by his lien on the cargo for the freight, and his marine insurance. Failure to prepay the freight, had there been any such, could not be the legal cause of the detention of the vessel.

Third: The third reason assigned by the District Judge for allowing this item of demurrage is "delay caused by demand for waiver of demurrage". This reason belongs to the same category as the others. Suppose it to be a fact that the agents for appellants did make a demand upon the captain for waiver of demurrage; and assume such demand to have been improper; how could such a demand be the cause of delay of the vessel? Was not the captain physically at liberty, if he so chose, to laugh at such a demand, to answer it by refusing to comply with it, and to go to sea with his vessel? Assuming that the mill demanded that the master carry out his agreement made on October 16th, and that he sign a demurrage release, he was nevertheless at liberty, physically speaking, to breach his agreement, as he in fact did; the demand of the mill did not interfere with the control of the vessel by appellee to depart with her cargo. Neither the charterer nor the demands of the mill

prevented her from sailing or were the cause of her detention.

4. The principal cause of this detention was the prohibition of the War Trade Board.

At the trial, appellee testified as follows:

> "Q. Now, when did the vessel finally get away?
> A. On the 26th of December.
> Q. *What was the cause of all the delay during December?*
> A. *She was held by the War Trade Board.*
> Q. For what reason?
> A. An embargo had been placed on lumber, and *they would not permit her to sail* in this trade.
> Q. *So that she could not have sailed before that time without license and permission of the United States Government?*
> A. *No; the Government held her*" (142-143).

Later, in answer to questions asked by his own counsel, libelant testified:

> "Q. When did the War Trade Board first announce a policy, or *put into effect* a policy, requiring licenses for boats to sail to South Africa, if you know?
> A. I think it was sometime in November.
> Q. Was it prior to November 24th?
> A. I believe so" * * * (145).

Appellee's own testimony shows, therefore, that, when his vessel was loaded on November 24th, he was required to obtain a sailing license from the United States Government; that he could not have sailed on November 25th or 26th, or at any time thereafter without this license; that he was not able to secure this license until December 26th; that he did sail after it was secured, and

that *this requirement* of the Government "was the cause of all the delay in December".

Had the license requirement been a new regulation becoming effective on December 1st, the delay in securing the requisite permission would account for the delay in December alone, but not for the delay between November 24th and December 1st; but as this requirement was effective on November 24th, it appears by appellee's own testimony that the fact of the vessel's being "held by the War Trade Board" was the effective and controlling cause of the whole delay of the vessel after she was loaded. Appellee's testimony therefore disproves the allegation in his libel, upon which his claim for demurrage after November 24th is based, "that by the refusal on the part of said respondents to pay said demurrage, said vessel has already been detained five additional days". The refusal was an inefficient incident, but not the *cause* of the delay. The cause was, that "the Government held her".

It is earnestly submitted that, apart from all other grounds, this disposes effectively of all appellee's claim for any demurrage after November 24th. The award of demurrage in the decree, from November 24th to December 14th (twenty days) is erroneous, for the reason that if appellee's testimony were the only evidence in the case, it would be sufficient to defeat his claim conclusively, for it demonstrates that the causa causans of the delay of the vessel after November 24th, was *not* any default of appellants.

5. Another cause was appellee's failure to secure a crew.

The master, in his deposition, testified as follows, (on December 4th, 1917):

"Q. Have you signed your crew?
A. Not yet.
Q. When are you going to sign it?
A. *When I get one.*
Q. You have been trying to get a crew?
A. Yes.
Q. Up to this time you have not been able to get one though?
A. Yes.
Q. When did you first try to get a crew?
A. Trying to get a crew—last month.
Q. Have you not been able to get it?
A. No.
* * * * * * *
Q. You have not a single man signed up?
A. I haven't any; I have a carpenter on board, that is all. * * * I have the men ready to go with me as soon as we get through with this here. * * *
Q. When did you get your crew?
A. We got them up here.
Q. I say, when?
A. *I got them within the last day or two"* (82).

It appears therefore, that up to December 2nd, the vessel was not supplied with a crew. It would have been impossible for her to sail for South Africa with only a captain and carpenter on board. This difficulty in obtaining a crew was one of the causes of the delay down to December 2nd, and when she was then physically able to sail, the War Trade Board prohibited her from sailing until December 26th.

6. A further cause was appellee's act in seizing the cargo.

On November 30th appellee filed the libel and seized appellants' cargo on board appellee's schooner.

Assuming that appellee had a lien on the cargo for his alleged claim, he had no right to enforce it in such a manner as to aggravate appellants' supposed damages. His duty was to mitigate them. If the suit caused a detention of the ship, such detention was not caused by default of appellants, but was caused by appellee's choice of remedy.

It would have been more reasonable for appellants to commence a libel proceeding against appellee's schooner for failing to proceed on her voyage and thus delaying the cargo, than it was for appellee to commence this libel proceeding against the cargo at the particular time, and to attempt to charge appellants with new damages for the detention of the ship.

Appellee could not have charged appellants for the additional damages resulting from his own act even if he had been justified in attaching appellants' cargo; *a fortiori* he has no claim if the seizure of the cargo was not justified in law.

We contend that appellee had no legal right to seize the cargo. His alleged right rests upon the allegation in the libel

> "That, by the terms of said charter-party, libelant *was given a lien on said cargo* for all demurrage accruing to the libelant under the terms of said charter-party."

The detention of the schooner to enforce this alleged claim was unjustifiable for these reasons:

A. The charter-party contains no provision for demurrage at the port of loading; hence appellee had no lien on the cargo.

B. Assuming that the charter-party contained a provision for demurrage at the port of loading, appellee's right to enforce the claim by this remedy was, at best, doubtful.

C. Assuming that appellee had an undoubted lien under the charter-party, it was his legal duty not to enforce it in a manner to cause additional loss to appellants.

A. We have shown that the agreed demurrage of $250 per day under the charter-party applies only to cases of detention by charterer at port of discharge, and not to an alleged case of detention at port of loading. Granting that detentions by default of the charterer at the port of loading would make the charterer liable for any damages caused by such default, even in the absence of charter provisions, still appellee has not shown what, if any, damages he suffered by such alleged detentions.

B. Assuming, however, that appellee had a claim for demurrage under the charter-party for any detention at the port of loading, his right to enforce such assumed claim by seizure of appellants' cargo was at best a doubtful right.

In the case of *Elvers v. Grace*, 244 Fed. 705, this court had before it a charter-party containing a cesser-

and-lien clause practically identical with the one in the instant case. The court *held,* that such clause confers no lien on the shipowner with respect to an antecedent liability of the charterers for demurrage in loading. The court cited with approval the following rule laid down by the Circuit Court of Appeals for the Fifth Circuit in *Schmidt v. Keyser,* 88 Fed. 799:

> "Where the charter-party provided that all liability on the part of the charterer should 'cease as soon as he shipped the cargo', * * * the clause applied only to liability accruing after the loading, and did not relieve the charterer from liability before the completion of loading."

The court then drew the conclusion that this clause

> "*Confers no lien on the shipowners with respect to the antecedent liability of the charterers*" (88 Fed. *709*).

If the appellee in this case had no lien upon appellants' cargo with respect to any assumed liability of appellants for demurrage at Port Angeles, his seizure of the cargo was wrongful, and the detention of his ship consequent upon such seizure was caused not only by his own act, but by his wrongful and unlawful act.

Even if it were assumed that appellee's lien on appellants' cargo was *doubtful,* and that his seizure and detention thereof were the exercise of a doubtful right, he was still not justified in exercising such a precarious right in view of the fact that adequate remedies were open to him protecting fully his assumed rights without causing additional damages to appel-

lants. Appellee had no right to charge appellants with the costs of a doubtful experiment. If demurrage had accrued in his favor, which is denied, it was his duty to minimize appellants' damages by minimizing the demurrage period. Instead of performing this duty, he chose to extend the demurrage period by unnecessarily causing further detention. Unfailing and adequate remedies, not involving the detention of his vessel, were open to him; he had his action against the charterers in personam; he had appellants' cargo in his possession and the right to keep it in his possession until the time when it would reach destination at South Africa, and possibly beyond that time, if that should become necessary for the protection of his interests. All this could have been done without causing additional damages to appellants.

C. Assuming that appellee had a good and perfect lien on the cargo when he seized it, which is denied, he, by seizing it and thereby causing further detention to his vessel, chose unnecessarily a remedy which aggravated appellants' damages. Apart from all other consideration, he should not be permitted to recover these damages, because they were caused by his own fault, and in disregard of his duty to minimize damages.

7. There was no "detention by default" of the appellants or their agents, after November 25.

Appellee sued appellants and their cargo for demurrage under the charter-party, at the rate provided therein, "for each and every day's detention by

default of such party of the second part, or their agents, two hundred and fifty dollars ($250) per day".

The meaning of this clause in a charter-party was construed by Judge Wolverton in *Washington Marine Co. v. Rainier Mill Lumber Co.,* 198 Fed. 142, where the court said:

> "The term 'default' employed in that relation in charter-parties signifies failure on the part of the charterers to do or perform some duty or act which they have stipulated or are bound in pursuance of their contracted relation to do or perform. The term cannot be so broadly interpreted as to include all manner of causes of detention or delay, whether arising from act or omission in the discharge of duty on the part of the charterers or not."

The obligation to pay demurrage under this charter was not an absolute one; the charterers are answerable only for detention which may result from their default, from their non-performance of a contract duty.

In the instant case the real cause of the detention after November 24th, was not the non-performance, by appellants, of any charter obligation. Accepting appellee's own allegation in the libel, it was "The refusal on the part of said respondents to pay said demurrage". The vessel was not detained by this; nor was she detained, after loading, by any of the matters alleged by proctor at the trial, or by the lower court in its "Decision". The real and only legal cause was the default of her owner and master, their failure to proceed on the voyage when the cargo was on board.

B. Assuming that appellants' refusal to pay demurrage was the cause of the detention of the vessel, and assuming that appellants were in the wrong in refusing to pay it; nevertheless appellee is not entitled to demurrage, as he, also, was at fault.

We have shown that a mere refusal to pay demurrage to the owner of a vessel cannot be the cause of the detention of his vessel. If, indeed, appellants had seized the vessel for undertaking to sail from Port Angeles without furnishing what they considered to be a proper bill of lading, we could understand appellee's position in using appellants' act as a basis for a demurrage claim.

Waiving, however, this obvious objection, and assuming, for the sake of argument, that appellants had in fact caused a detention of the vessel in consequence of a controversy which they had with appellee over the proper form of bill of lading, appellee would still not be entitled to demurrage if it appeared that he was also at fault in detaining his ship in port during the pendency of the controversy. We have shown that he was in the wrong in keeping his vessel in port in order to enforce a lien which he did not possess; apart from this, the presentation of bills of lading by the mill,—assuming them not to be true bills—did not justify his demurrage claim.

The case of *Hansen v. American Trading Co.,* 208 Fed. 884, is in point. It is there *held,* that demurrage is not recoverable for the detention of a vessel after she was loaded because of a dispute in respect to the bill of lading where both parties were in the wrong.

The case also shows that the Harter Act expressly imposes upon the master the duty of issuing a bill of lading which, of course, is to be a true bill; that if the bills presented to him by the charterer are not true bills, he is right in refusing to sign them, but is wrong in not tendering what he considers to be a true bill, and that, if such mutual fault leads to delays, the master cannot claim demurrage.

Assuming, then, that the mill presented an objectionable bill of lading, which the master properly refused to sign; how could such a fact be the cause of detention of the vessel, when the master has not only the liberty, but the statutory duty, to issue a true bill of lading? His failure to perform this duty was the cause of the detention of the vessel rather than the cause attributed by the District Court in awarding demurrage.

II. AS TO THE PERIOD FROM NOVEMBER 30th TO DECEMBER 14th.

With respect to this period, we contend:

A. That there was no default on the part of the appellants for each of the reasons stated under subdivision I.

B. That there was no default on the part of the appellants for the additional and special reason that demurrage for that period was expressly waived, at the trial, by proctor for appellee.

C. That appellee cannot recover, on a libel filed on November 30th, damages which may have occurred thereafter.

A.

The argument in subdivision I applies to this period, as well as to the period from November 24th to November 30th.

B.

At the examination of libelant's first witness, the proctor for libelant stated in open court (after having, to the best of our recollection, made the same statement in his opening remarks at the trial):

> "Our claim for delay consists of *five days after November 24th* * * * *but we are making no claim for the subsequent time*" (146)

The libel was filed at the end of these five days.

Relying upon this statement by counsel, no attempt was made by appellants, at the trial, to make a defense against any claim beyond the five days mentioned by counsel. We submit that appellants had a right to rely upon the admission and waiver made by counsel and to refrain from entering upon any defense covering the period after November 29th; and we submit that the award of demurrage for the fifteen days subsequent to November 29th, for which libelant was "making no claim" is not consonant with any principle of law or equity.

C.

The libel, filed on November 30, 1917, alleges:

> "Libelant demands * * * a like amount of two hundred and fifty dollars ($250) per day for each day's detention *from and after this date*" (8).

No amendment of the libel, or supplementary libel, was thereafter filed; on the contrary, libelant waived this demand at the trial in open court. The decree of the District Court awards to libelant demurrage for fifteen days under this allegation, making the sum of $3750.

Had libelant brought his action in a court of his own state, he could not recover damages claimed for a period subsequent to the institution of his action, the Supreme Court of Washington following a principle (which, in the absence of a statutory enactment, is the general rule of law), that, for a recovery of damages occurring after the time the action is brought, the plaintiff must amend his petition or file a supplementary petition.

International Development Co. v. Clemens, 109 p. 1034.

In the instant case, no leave to file an amendment could have been granted after libelant, in open court, had explained the allegation of his libel as meaning that no claim was intended for the period after the libel was filed; and in fact, no leave to file an amendment was applied for nor an amendment filed. Libelant must stand on his pleadings and admissions. The issues tried in the District Court were confined to the period ending on November 29th. The award of the court *exceeds* by $3750 what appellee had contended for or had a right to contend for, and what appellants had no fair opportunity to meet in defense.

For the several reasons stated, the award of demurrage for the fifteen days' demurrage beginning with the day on which the libel was filed was clearly in error.

Synopsis of the Decisive Points.

The demurrage awarded was "for the period between October 15, 1917, and December 14, 1917", less deductions, making 45 days.

1. From this period, the period from October 15th to October 18th should be deducted, because: (a) the vessel was not ready to load until October 18th, on account of the order of the owner given to the master; and, (b) the agreed evidence of seaworthiness had not been furnished to charterers.

2. (a) During the period from October 18th, the day when loading commenced, to November 24th, when loading was completed, appellants and their agents delivered the cargo with a diligence reasonable under the existing conditions, and thereby performed their charter obligations. The conditions preventing a more expeditious loading were conditions growing out of the war, such as commandeering of the mill's resources, and the after-effects of a strike paralyzing the lumber industry.

(b) Before beginning the loading, the owner and the charterer of the vessel, recognizing the existing extraordinary conditions, made an express agreement,

by their agents, to waive demurrage under the circumstances.

3. (a) During the whole period from November 24th to December 14th, and in fact to December 26th, the vessel's owner was unable, on account of war regulations, to secure the permission of the War Trade Board to sail with her cargo. This was the efficient cause of her detention; no default of appellants caused or contributed to the detention.

(b) In addition to the foregoing reason, the special reasons, why the allowance of demurrage from November 29th to December 14th was error, are:

(1) It is contrary to the admissions of appellee;

(2) It is damages not in issue at the trial.

In addition to these salient and decisive points there are the other, minor and subordinate, but sufficient grounds, discussed in this brief, and showing that the District Court was in error in allowing any demurrage. The decree should therefore be reversed, with instructions to the lower court to dismiss the libel, with costs to appellants.

Dated, San Francisco,
March 25, 1920.

Respectfully submitted,

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Proctors for Appellants.

No. 3426

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN ADMIRALTY

HIND, ROLPH & COMPANY, a Copartnership, and 1,727,783 Feet of Lumber Loaded on Board the Schooner "Levi W. Ostrander," and Fidelity Deposit Company of Maryland, a Corporation,

Appellants and Cross-Appellees,

vs.

H. F. OSTRANDER,

Appellee and Cross-Appellant.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division.

ANSWERING BRIEF OF H. F. OSTRANDER, APPELLEE AND CROSS-APPELLANT

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The ultimate question for solution involved in this particular appeal is whether Judge Neterer was right in awarding Mr. Ostrander demurrage for the

period from the 15th of October to December 14, 1917, less fourteen (14) days exclusive of Sundays. We have discussed in another brief the claim of Mr. Ostrander for demurrage for the period from August 25th to October 14th. There is, however, one contention made by the charterers in this case which they will claim applicable to the whole period. As early as August 16, 1917, Hind, Rolph & Company asserted that the *strike clause* in the charter party exonerated them from any liability for demurrage, and that position has been maintained by them ever since. In fact, no other reason for denying liability for demurrage was ever assigned until the filing of the answer. Even if the charterers' construction of the strike clause is correct, yet we think it clear that the provisions of that clause cannot avail them as far as the delay subsequent to October 14th is concerned, and logically therefore the question should be dealt with in the reply brief in the other appeal. But for the sake of convenience we deal with it here. Again, we believe that we can best aid the court by dealing chronologically with the questions involved in this appeal. So doing will require that we depart somewhat from the order in which such questions are considered in appellant's brief.

We summarize, first, that which happened prior to October 14th. The charter party was executed on May 15, 1917. It provided *inter alia* that lay day *should not commence before July 1, 1917,* "unless at charterers' option," and that if vessel did not arrive at port of loading on or before twelve o'clock noon of the 31st day of August, 1917, charterers had the option of cancelling or maintaining the charter on the arrival of vessel. (14.)*

Shortly after the execution of the charter party Hind, Rolph & Company requested advice as to date when vessel would be ready to load. On August 13th, they were advised that the schooner would be ready for cargo on August 25th. This notice was accepted, but no direct, unqualified order to go to the loading port was given to the schooner until October 12th. Notice having been then given, the schooner took a tug and arrived at Port Angeles on the morning of October 14th.

FROM OCTOBER 14TH TO OCTOBER 17TH THE DEMURRAGE RELEASE.

Upon the arrival of the schooner at Port Angeles her Master delivered to the Puget Sound Mills & Timber Company (hereinafter called the Mill Company) the following letter:

---

* (Numbers in parenthesis refer to pages of Apostles.)

"Puget Sound Mills & Timber Co.,
As representing,
Messrs. Hind, Rolph & Co., San Francisco,
Charterers of Schooner 'Levi W. Ostrander'
Port Angeles, Washington.

Dear Sirs:-

"This is to advise you that in accordance with telegraphic instructions from Messrs. Hind, Rolph & Co. of San Francisco, received by my owner at Seattle, October 12th, requesting that my vessel be ordered here, I now hand you Surveyor's report and would advise that I am ready to receive cargo.

"Further, my vessel having been at all times, since August 25th, ready to receive cargo and due notice of such readiness having been given to Messrs. Hind, Rolph & Co., please note that demurrage will be claimed for all time during which charterers have failed to furnish cargo, in accordance with Charter Party of May 15, 1917.

Yours very truly,
Master — Schooner 'L. W. Ostrander'
Sgd — Carl F A Henningsen.

Port Angeles, Wash.
October 14, 1917."
(Respondents' A-2.)

It is true that the Captain says that this note was delivered on the 15th (54), but he must be in error in that regard, as the notice is dated October 14th and the Mill Company on that date wired Charles Nelson Company at San Francisco, as follows:

"Port Angeles, Oct. 14, 1917.
To The Charles Nelson Co.,
San Francisco, Calif.

"Ostrander here this morning Captain serves notice lay day commencing August 25th. We refused to accept notice also refused to give vessel any lumber. We have about 250 thousand on dock. Advise as soon as possible what we are to do.

Puget Sound Mills & Timber Co."
(Respondents' A-17.)

The Charles Nelson Company replied on October 15th as follows:

"San Francisco, Oct. 15, 1917,
Phoned to C. F.—3/20 P M
To Puget Sound Mills & Timber Co.
Port Angeles, Wn.

"Ostrander. Under no condition consider lay days as commencing August 25th or any date prior to arrival of vessel at the loading port and reported ready for cargo. Advise captain account strike conditions you are *short of logs* suitable for this cargo and that you are doing the best you can and will agree to proceed with cargo as rapidly as possible with specific understanding that no demurrage will be claimed when loading completed.

Charles Nelson Company."
(Respondents' A-16.)

We digress at this point to consider a matter not pertinent to the immediate question under consideration. It is claimed over and over again in appellants' brief that the Mill Company throughout

the entire transaction acted with due diligence and with fairness to the shipowner. It will be noted, however, from the two preceding telegrams that the Mill Company would not act until it received instructions from San Francisco. The Charles Nelson Company directs the Mill Company to give to the Master of the "Ostrander" a reason why cargo cannot be furnished as required by the charter party. The Nelson Company tells the Mill Company to inform the Captain that the Mill Company is *short* of *logs*. Was that statement true? All the evidence in the record unmistakably points to the conclusion that the statement was untrue. From the report demanded by us from the Mill Company (Libelant's ——), it appears that on June 30th the Mill Company had in its pond at Port Angeles 1,742,000 feet of No. 2 fir logs; on July 1st it had 2,016,000 feet; on August 31st, 1,994,710 feet; on September 30th, 2,044,600 feet; on October 31st, 1,848,030 feet; on November 30th, 2,262,860 feet. If, therefore, the advice which Charles Nelson Company directed the Mill Company to give to the Captain was true, it would have been impossible for the Mill Company to have provided the cargo for the "Ostrander" even in the month of June, *weeks before the strike took place,* because on June 30th the Mill Company had a lesser number of feet of

logs in its pond than at any time during the succeeding five months. Moreover, it will be remembered that on October 12, 1917, (Libelant's 1-E[1]), Hind, Rolph & Company gave as one of the reasons for sending the "Ostrander" to Port Angeles that the Mill Company had a *good supply* of *logs* on hand. It certainly would seem reasonable that Hind, Rolph & Company obtained this information from Charles Nelson Company.

Returning, now, to that which happened from October 14th to October 17th, the evidence discloses that the Mill Company, duly obedient to its advice from San Francisco, delivered to the Captain of the "Ostrander" the following letter:

> "We are herewith returning you your notice for readiness to receive cargo, as we cannot accept this notice.
>
> "The notice states, lay days will commence from August 25th. You cannot expect us to accept such a notice when you did not arrive at our dock until October 14, 1917. Further, we will *not* accept *any notice at any time* in regard to the commencement of lay days. We wish to advise you that we have had a strike at our plant which stopped operations in our saw mill and logging camps for about two months and we have not up to the present time been able to resume operations to full capacity the same as before the strike.
>
> "Should you, however, wish to commence loading, you may do so providing you waive all

claim for demurrage. We agree to furnish you lumber as fast as we possibly can." (Respondents' A-4.)

Mr. Ostrander on the same day wired Hind, Rolph & Company as follows:

"Puget Sound Mills and Timber Company have notified master of Ostrander now at their mill Port Angeles that they will furnish no cargo to vessel unless all claims for demurrage are waived and also that they will not accept any notice at any time of commencement of lay days. They returned to the master his notice that he was ready to receive cargo STOP Were they acting under instructions from you in so doing STOP Do you take the position assumed by them STOP Unless cargo furnished without further delay I will consider you have abandoned charter and I will employ vessel in other service and will hold you for demurrage to date and also for all other losses I may sustain." (Libelant's Exhibit 3-A.)

Hind, Rolph & Company, knowing that the position taken by the Charles Nelson Company and the Mill Company was wrong, sent the following telegram on October 15th:

"Puget Sound Mills and Timber Company were not acting under instructions from us. We have *interviewed* their representative and are assured that you misunderstand their position. Mill has part of cargo ready and will deliver this to master for loading at once; also will deliver balance as fast as strike conditions permit; but mill will refuse to recognize your claim for demurrage on account of conditions resulting from strike. We wish it

> distinctly understood that we are not abandoning charter and that we deny liability for demurrage and losses mentioned in your wire." (Libelant's 3-B.)

This telegram was received by Mr. Ostrander on October 16, 1917, at about 8:30 A. M. It will be noted that Hind, Rolph & Company say in the telegram just set out that Mr. Ostrander misunderstands the position of the mill. But in view of the telegrams passing between the Mill Company and the Nelson Company we think it clear that Mr. Ostrander did not misunderstand the Mill Company's position.

The Charles Nelson Company, after the interview mentioned in the preceding telegram, wired the Mill Company as follows:

> "Ostrander. Give captain letter stating he may commence loading now and you will furnish cargo as rapidly as possible under existing conditions, but when he has *completed loading* you will *dispute* any claim he may make for demurrage. This supersedes our wire date." (Respondents' A-15.)

Obedient to this wire, the Mill Company delivered a letter to the Master of the "Ostrander," in which the Mill Company said:

> "It is agreeable with us you commence loading now or any time your vessel is ready to receive cargo, and we will furnish the cargo

just as rapidly as possible under existing conditions. We will, however, on the *completion* of the loading of your vessel, *insist upon a demurrage release* and will dispute any claim you make for demurrage." (Respondents' A-5.)

The Captain then replied as follows:

"Port Angeles, Octbr. 16th, 1917.
The Puget Sound Mills & Timber Co.,
Port Angeles, Wash.
Gentlemen:

"In answer to your letter of even date, I wish to state that I have orders from the owners in Seattle to await instructions from them before commencing to load." (Respondents' A-6.)

At 2:22 P. M. on October 16th Mr. Ostrander relying on the message from Hind, Rolph & Co. (Libelant's 3-B), sent this telegram to his Captain:

"Please notify the Mill Company that you will now receive cargo as offered but without prejudice to any claim for demurrage we may have against Hind, Rolph & Company as charterers, should the mill now be willing to deliver cargo on this basis. Please agree daily with the mill as to amount delivered to you each day and the amount you could reasonably have expected to load. This that the daily shortage may be thoroughly established. Wire answer." (Libelant's 10-A.)

And at 6:05 P. M. on the same day he wired the Master as follows:

"Further to my wire this date, if notice not already given deliver to mill as requested, also

> acknowledge receipt of their letter of date and in reply point out that the charter being with Hind, Rolph & Co. and not with the mill company *we will look to the former for demurrage* and therefore cannot discuss the question of demurrage with the mill as principal." (Respondents' A-8.)

The Master, some time on the following day, delivered to the Mill Company the following letter:

P. S. M. & T. Co.
Received
Oct. 17, 1917

> "This is to notify you that the Schr. Levi W. Ostrander will be ready to receive cargo today at 1 p. m. I also agree under existing conditions to sign a demurrage release to your mill upon completion of cargo." (Respondents' A-7.)

That this letter was received on October 17th is made manifest by the stamp placed thereon.

The mere reading of this correspondence will demonstrate that immediately upon the Captain's presenting his notice of readiness to load cargo, the Mill Company sought advice from Charles Nelson Company; that Charles Nelson Company directed the Mill Company to refuse the notice, and that the Mill Company complied with this order; that as soon as Mr. Ostrander was informed thereof he wired Hind, Rolph & Company; that Hind, Rolph & Company did not claim that the Master should

sign a demurrage release before he commenced to load his vessel; that apparently they so advised Charles Nelson Company; that thereupon the Nelson Company so advised the Mill Company, and that as soon as Mr. Ostrander was informed that a condition which the Mill Company did not have a right to exact was no longer being insisted upon, he directed the Master of the Schooner to accept the cargo. The delay, therefore, was attributable solely to the refusal of the Mill Company to furnish cargo unless an illegal exaction was complied with.

It is said, however, that the Captain did agree on October 17th to sign a demurrage release, and that Mr. Ostrander did not repudiate his action in that regard. We think the evidence makes clear the manner in which this agreement for a demurrage release was obtained. The telegram sent by Mr. Ostrander to his Master at 2:22 P. M. on October 16th (Libelant's 10-A) was telephoned by the Telegraph Company to the Mill Company, and by the Mill Company delivered to the Captain (305). Moreover, the telegram sent at 6:05 P. M. on October 16th by Mr. Ostrander to his Captain was also apparently telephoned by the Telegraph Company to the Mill Company, and by the Mill Company de-

livered to the Captain, for it had thereon the following stamp:

"P. S. M. & T. CO.
RECEIVED
OCT. 17, 1917"

The *Mill Company* therefore *knew* the contents of both of these telegrams *before* they were known to the Master.

We believe that no one can escape the conclusion that the Mill Company, having read the telegram sent at 6:05 P. M. October 16th (Respondents' A-8) by Mr. Ostrander to his Captain, induced the Captain to give to it the letter in which the Captain agrees to sign a demurrage release. That the Captain misinterpreted the telegram sent by Mr. Ostrander at 6:05, and was thereby the more readily induced by the argument of the representative of the Mill Company to sign the letter, is clearly apparent from the letter sent by him to Mr. Ostrander on the same day (Respondents' B). It is obvious, of course, that there was no instruction in the telegram sent at 6:05 on October 16th by Mr. Ostrander which would warrant the Captain in agreeing to give to the Mill Company a demurrage release.

It is equally obvious that the claim now made by the charterers that Mr. Ostrander never repudiated the action of his Captain is without merit. We say

this because the evidence discloses that Mr. Ostrander having received Captain Henningsen's letter wired him at 10:25 A. M. on October 18th as follows:

> "Hind, Rolph & Company having agreed to pay the ten per cent and labor demanded by the mill it is now in order to begin loading. However, before loading, I want you to reach a definite agreement with the mill that, having no contract with the mill as principals, the question of demurrage cannot be discussed between us; that our claim is clearly against Hind, Rolph and we do not know or do not care what agreement Hind, Rolph & Company have with the mill. Therefore it is not in order for the mill to ask you to sign a demurrage release; that if acquired must be obtained from Hind, Rolph. I make this request as I fear your notice mentioned in your letter 17th may possibly embarrass us in our claim against Hind, Rolph." (Libelant's 10-B.)

This telegram was also telephoned by the Telegraph Company to the mill. It was then written out on a typewriter by the mill and delivered to the Captain (306). The Mill Company therefore *knew on October 18th* that Mr. Ostrander had *repudiated* the action of the Captain. Furthermore, Mr. Ostrander testified that at the time he was at the Port Angeles mill in October, 1917, he had a conversation with Mr. Scott, the Manager of the Mill Company, in which he asked Mr. Scott for the letter signed by Captain Henningsen on October 17th. Mr. Scott

showed Mr. Ostrander the letter, and Mr. Ostrander thereupon told him that, without regard to the letter, he would still, as he always had, insist upon demurrage being paid. (379, 380.) Mr. Scott at the time of the trial would not deny that such a conversation took place. (230.) Mr. Ostrander also testified that he did not know that the Captain had signed the letter of October 17th until he received, on the morning of the 18th of October, the letter hereinbefore set out. (Respondents' B.)

The allegation of the answer, therefore, that the Captain was in this regard "acting with full authority from the libelant," is wholly disproven by the evidence, and the assertion now made in the brief (Appellants' Brief, p. 37) that Mr. Ostrander did not repudiate what the Captain had done is also disproven by the evidence. Unless Mr. Ostrander ratified the action of the Captain in agreeing to give a demurrage release, the action of the Captain was wholly null and void.

In *Holman v. Peruvian Nitrate Co.,* 5 Sc. Sess. C., 4th Ser. p. 657, it appears that the Peruvian Nitrate Company in 1874 chartered the barque "Constantine" belonging to John Holman & Sons, shipowners, London, to proceed from Leith with a cargo of coals for the port of Iquique in Peru, and after unloading to take on there a cargo of nitrate of soda

to be discharged in a port in the United Kingdom. There was a charter party for the outward and one for the homeward voyage. After the "Constantine" had unloaded the cargo of coal at Iquique, she proceeded to take on the homeward cargo. Iquique is an open roadstead, and the cargo had to be delivered alongside the ship from lighters. Owing to the condition of the surf, it was impossible, on divers days, to deliver any cargo to the boat. The Court held that the charterer was not exonerated by reason of its inability to deliver the cargo within time. The captain, however, had delivered to the agent of the Peruvian Nitrate Company at Iquique the following documents:

> "Received from the Peruvian Nitrate Company, Ltd., the sum of 46 soles, in full of demurrage in the loading of homeward cargo of nitrate of soda under charter party dated 8th September, 1874."

The Court after pointing out that the Captain insisted that the receipt covered only one day's demurrage, said:

> "But apart from that question, I am of opinion that the captain had no power to grant any such discharge. I have already referred to the powers of a shipmaster as agent of his owners in a foreign port. *It may often be that a claim for demurrage may be as large, or almost as large, as the claim for freight itself.* If a vessel be detained waiting for a cargo there

> may arise very large claims indeed. These are claims stipulated for in the charter-party as between the shipowner and the charterer. *The right to payment arises to the shipowner, and I do not think the captain in a foreign port has power in ordinary circumstances to discharge that right. Such a power is not necessary in the ordinary use of the ship or performance of the voyage, and it would be a serious matter for shipowners if a captain in a foreign port should be entitled to discharge a large claim of demurrage for a comparatively small sum.* The demurrage in this case was to be paid *daily,* and that shews that the captain had power to receive and discharge the demurrage actually paid. I think he had not authority, however, to grant a discharge binding *his owners for demurrage that he never received.*"

It will be remembered that the charter party here involved also provides for the payment of demurrage *day* by *day* or *daily.*

Now if a captain does not have the power to waive a demurrage claim in a port some 7,000 or 8,000 miles away from the residence of his owners, much less does he have the power when his owner is only a few miles away and when his owner can be communicated with hourly.

Furthermore, what was the consideration for the Captain's agreement? Neither the Mill Company nor Hind, Rolph & Company paid him a single

dollar. In the seventh affirmative defense in the answer a consideration is attempted to be pleaded in the following manner:

> "That had libelant not specifically recognized said conditions affecting the *furnishing* and loading of said cargo, and had he not specifically agreed in consequence thereof to waive all claims for damages, and to release claimants and said cargo from all claims for demurrage, the loading of said cargo would not have been commenced until a *later* time when said conditions had changed and become *normal.*"

In the first place, it is to be observed that there is not a scintilla of evidence in the case tending to establish any of the foregoing allegations. It follows, therefore, that even if the facts alleged constitute a consideration, nevertheless, no consideration has been proven. But the facts alleged do *not* constitute a consideration. It is not pretended that there was at any time in the summer of 1917 a strike of men engaged in the *actual loading* of ships; and, as we shall subsequently show, the exception clause in the charter party refers to a strike of such men only. The strike, therefore, if there was any, affected the furnishing of the cargo only, and the exception clause in the charter party does not cover such a strike. The charterers, consequently, were bound to furnish the cargo. How, then, can it be said that a consideration was given the Captain by

the doing of that which the charterers were bound absolutely to do? Again, even if we assume for the sake of the argument, that the exception clause covers the furnishing of the cargo as well as the actual loading of the vessel, still the position of the appellants is not improved. There was *no strike* at the mill or in the logging camp on *October 15, 1917.* The mill resumed work on *September 6th,* five weeks before; and the confidential report made to the West Coast Lumbermen's Association shows that in the week ending *September 22, 1917,* "the sawmill, box plant, planer and shingle mill were all running to *full capacity,*" and that the men were working 10 hours a day. (Libelant's 11.) If it be the law, as alleged in this affirmative defense, that no cargo need to have been furnished the "Ostrander" until conditions changed and became normal once more, then, according to the testimony of Mr. Scott, the cargo need not have been furnished *even down to the day of trial,* for he testified that "we never got back to the normal capacity of the mill," and that the mill was not 100 per cent efficient at the time of the trial. (204.)

It seems to us, therefore, indisputable that there was no consideration for the Captain's agreement. If so, no distinction can be made between the facts

in this case and the facts in the case of *Durchman v. Dunn,* decided by Judge Brown, and reported in 101 Fed. 606, affirmed 106 Fed. 950.

Viewed from any angle, therefore, we are unable to see why the libelant is not entitled to demurrage for the 15th, 16th and part of the 17th of October. The schooner was at Port Angeles. The strike was over. The delay was solely attributable to the mill, which was, in this instance at least, the agent of the appellants.

AFTERNOON OF OCTOBER 17TH AND OCTOBER 18TH—THE STEVEDORE DISPUTE.

On pages 10 and 11 of Appellant's Brief it is argued that after the dispute concerning the demurrage release was over, the Master of the vessel, though the mill was ready to furnish cargo, refused to receive it because of an order to that effect received by him from Mr. Ostrander, and the following phrase in the letter written on October 18th by the Master to Mr. Ostrander is relied upon to support this contention:

> "Mr. Ryan informed me later that *he had orders from you not to start loading* until further orders, so we are *therefore* at a standstill yet." (Respondents' B.)

The reason for the giving of such an order by Mr. Ostrander arose from *"high-handed and unjust procedure"* on the part of the Mill Company.

The charter party provided that "the stevedore, if any, to be employed by the vessel." (13.) No question has been made but that the vessel was able to employ its own stevedores. The Mill Company, however, had in its employ a number of stevedores. Mr. Robinson, the Assistant Manager of the Port Angeles Mill, told Mr. Ryan, the representative of Mr. Ostrander, that these stevedores had charge accounts at the Mill Company's store, and that the only way that the Mill Company had to get its money out of these men was to give them employment. (173.) More than that, the Mill Company demanded that the Master pay it ten per cent *more* than the wages of the stevedores.

About nine o'clock on the morning of October 17th Mr. Ostrander wired Hind, Rolph & Company as follows:

> "Re schooner Ostrander. The mill only this morning indicated readiness to deliver cargo and then gave notice that outside labor would not be permitted to work the vessel at its dock and that a charge of ten per cent on the payroll would be exacted by the mill for its men employed by the Master. There is nothing whatever in our charter warranting such action and

> I refuse absolutely to pay such charge. You will either have to agree to absorb it or furnish us cargo where we may load it with such men as we see fit." (Libelant's 3-C.)

This telegram was not received by Hind, Rolph & Company until late in the afternoon of October 17th. (Libelant's 3-E.)

Apparently before the receipt of Mr. Ostrander's telegram by Hind, Rolph & Company, Mr. Scott of the Mill Company advised Charles Nelson Company by wire (Respondents' A-9) that the Master would not employ the Mill Company's stevedores nor pay the ten per cent. Charles Nelson & Company replied as follows:

> "Ostrander. The position you are taking is absolutely correct. Stand pat." (Respondents' A-14.)

Hind, Rolph & Company upon the receipt of the telegram from Mr. Ostrander took the matter up with Charles Nelson & Company (Libelant's 3-E) and thereafter wired Mr. Ostrander as follows:

> "We agree with you that position taken by mill regarding stevedoring is *very unjust and high-handed procedure.* However, are particularly anxious avoid further delays or difficulties of whatsoever nature and will agree to pay this ten per cent ourselves if it is necessary for you to arrange on this basis." (Libelant's 3-D.)

The Charles Nelson Company itself subsequently acknowledged that it was in the wrong, for it wired the Mill Company as follows:

> "Ostrander. *Stand taken by Captain legally correct.* Proceed to give vessel cargo. Send us copy of notice served on you by Captain advising lay days commencing August 25th." (Respondents' A-13.)

The occasion, therefore, for the issuance of the order by Mr. Ostrander to his Captain not to commence loading was due to the illegal exaction made by the Mill Company. It is true that it was alleged in a separate affirmative defense in the answer in this case that the delay in loading was caused by the failure of Mr. Ostrander to secure stevedores. It is admitted now, however, by all parties, that the delay was caused solely by a very high-handed and unjust act on the part of the Mill Company, and that the Mill Company was in this regard the agent of the appellants herein. The responsibility for this delay, therefore, is upon Hind, Rolph & Company and the appellee is entitled to demurrage by reason of such delay.

THE SURVEYOR'S REPORT.

It is argued (Appellants' Brief, page 11 *et seq.*) that the lay days of the vessel did not commence until October 18th, because no surveyor's report was

tendered to the Mill Company until October 14th, and that the report then tendered was not a sufficient report. The facts concerning this matter are: On August 25th the schooner was ready to receive her cargo and was ready for her contemplated voyage, except for the bending on of some sails. Captain Gibbs testified that he would have issued a surveyor's report on that date, stating that the vessel was ready for her voyage, if he was given assurance that the sails would be placed in position. He did not issue a report on that date, however, for the reason that Mr. Ostrander did not ask for a report on that date. There was no reason, of course, why Mr. Ostrander should make such a request on August 25th. It is true it is said that a surveyor's report is necessary in order for the charterer to insure the cargo, *but the charterers had no cargo to insure on August 25th.* Even on the morning of October 15th they had only about 200,000 feet of lumber on the dock at Port Angeles. What benefit, therefore, would they have derived from having in their possession on August 25th, or even on October 14th, a surveyor's report? How were they damaged by its not being delivered to them at an earlier date? If they had had any need of a surveyor's report it could and would have been furnished to them as early as August 25th. (390-

394.) However, as soon as there was any necessity for the surveyor's report, Mr. Ostrander secured it. He gave it to the Captain, and the Captain on October 14th, as soon as he arrived at the mill, delivered it to the mill. (Respondents' A-2.) True, Mr. Hodges of Hind, Rolph & Company testified that he did not receive this surveyor's report until some time in December (274) when he received it from the Douglas Fir Exploitation & Export Company. The fact that it was not received by Mr. Hodges until December is, of course, immaterial because the Mill Company was the agent of Hind, Rolph & Company. The fact, however, that the report was not delivered to Hind, Rolph & Company until some time in December, and no demand apparently was ever made by them on the mill for the document prior to that time, demonstrates that Hind, Rolph & Company did not have much need of the surveyor's report at all.

It is argued, however, that the surveyor's report was insufficient in that it does not show that the vessel was, on October 15th, ready to receive her cargo or in proper condition for the voyage. The basis for this contention is that the vessel had not been examined by the surveyor on October 15th. The only question which the charterers could possibly raise in this case, however, is not whether the

boat was examined on October 15th, but whether a report dated on that date was delivered to the charterers or their agents. *The report is dated in October* and it shows that the vessel was suitable for the voyage. It recites that *the boat was well-built* and was in the opinion of the surveyor *"suitable to load a cargo of lumber for South Africa."* (50.)

It is true that some time apparently in the month of September, the wildcat of the windlass on the schooner broke. That fact, of course, does not show that the vessel was not seaworthy either on August 25th or on October 14th. The windlass in question had been tested out and found to be perfect. Thereafter, for some inexplicable cause, it broke. (159, 162, 394.) It is a matter of common knowledge that cast iron will contain blow holes and that the utmost vigilance cannot detect their presence. We think the lower court was perfectly right in forbidding any further inquiry into this matter. (160.)

The record does disclose that the vessel was actually seaworthy at Port Angeles; that she was surveyed by a surveyor of the San Francisco Board of Underwriters; that the surveyor issued a surveyor's report on October 13th, and that he would have issued a like report on August 25th, or at

any time thereafter; that this report was delivered to the charterers or their agents; that if one of the reasons for demanding a surveyor's report is to enable the charterer to insure a cargo such reason did not exist in this case, for the appellants had no cargo to insure.

Moreover, even if the surveyor's report had never been procured or delivered, such fact or facts would constitute no defense in this case, for Hind, Rolph & Company clearly waived compliance with this condition of the charter party.

In the case of *Wencke v. Vaughan,* 60 Fed. 448, it appears that a master of a chartered vessel gave notice that his vessel was ready for cargo, but failed to serve a surveyor's certificate as required by the charter party. The charterers made no complaint on this or any other ground, but stated that they *were not ready to furnish a cargo.* The Court of Appeals for the Fifth Circuit said:

> "The District Judge correctly held: 'By receiving the within notice without the certificate, and, when subsequently questioned by the master as to cargo, remaining silent about the absent certificate, the respondent must be considered to have waived that condition.' "

The Court of Appeals further approved the following statement of the District Judge:

> "Where time is running against the party, and the notice of defect is so *easily* given of a document which might be easily supplied if the party receiving the notice *wishes to rely* on the *omission,* he must, in fairness, be required to *signify* it to the other party."

Again, it is said (Appellants' Brief, p. 13) that lay days should not commence before October 18th, for the reason that the charterers had a right to cancel the charter party until the surveyor's report was tendered. The surveyor's report, however, was tendered on October 14th, and even if it had not been tendered at that time or delivered the charterers would not be excused for delay in furnishing the cargo, because, as we have just shown, they clearly waived compliance with such provision of the charter party.

FROM OCTOBER 18TH TO NOVEMBER 24TH

The schooner commenced loading at one o'clock on the afternoon of October 18th and completed same on the evening of November 24th. The operation therefore consumed 37½ days. The lower court found that "the vessel could readily have been loaded in 14 days." (445.) Her failure to load in 14 days was due to the fact that the charterer did not comply with the following provision of the charter party:

"T. Cargo to be delivered to vessel at loading port as fast as vessel can receive it."

Hind, Rolph & Company now claim that they are excused for the breach of this provision of the charter party because of a strike which prevented the furnishing of a cargo. That proposition we now consider. As we have stated elsewhere in this brief, however, consideration of this topic applies to the period before the vessel arrived at Port Angeles as well as the period thereafter.

THE PRIMARY DUTY OF THE CHARTERER IS TO HAVE A CARGO IN EXISTENCE.

The rule, as we understand it, is that it is the duty of the charterer to supply, provide or furnish a cargo and have it at the prescribed place and ready for the ship when the ship is ready for it. This rule is as old as the maritime law itself.

Ashburner's Rhodian Sea Law (Oxford University Press 1909) page CLXXXVII.

This duty of the charterer may be and usually is modified by exceptions in the charter party, but these exceptions, unless the contrary intention is *clearly expressed,* apply to *actual loading only.* "A court will not lightly infer that the shipowner has agreed to relieve the charterer from liability for

delays which he (the owner) *has no possible means of preventing or lessening.*" *Dampskibsselskabet Danmark v. Paulsen & Co.* (1913) Sess. Cas. 1043.

That the primary rule is as we have stated is easily susceptible of proof.

> "In performing his duty the first step which the charterer must take is *to procure* a cargo. The cargo must correspond with the description of the cargo in the charter party, and must be of the stipulated quantity. The charterer is, as a general rule, responsible for a failure to procure a cargo in due time, or at all. *Even the impossibility* of *procuring* a cargo does *not* excuse him. *The stipulated cargo may not exist;* it may be *impossible* in the existing state of things to obtain it; its exportation may be restricted or prohibited by the Government of the place whence it is to be procured. Nevertheless, in all these cases the charterer is responsible for his failure, whether *total* or *partial,* to procure it, unless the whole transaction is vitiated by illegality."

Halsbury's Laws of England, Vol. 26, § 284.

In *McLeod v. 1600 Tons of Nitrate of Soda,* 55 Fed. 528, 61 Fed. 849, the charterer was unable to furnish a cargo because a civil war then raging in Chili made it impossible for him to procure it. This Court said:

> "There was no unusual or extraordinary interruption in the *loading* of the Dunstaffnaage. There was no interruption or interference therewith at all. There was no interposition of force

> between the cargo and the vessel. There was no closing of docks or seizure of property. The difficulty was of an entirely different nature. It arose from the fact that the charterers *had no cargo to load.* In entering into the charter party, the shipowner placed his vessel at the *disposal* of the charterers for the stipulated time and voyage. *He had the right to rely upon the existence of a cargo ready for shipment as soon as the vessel should arrive at Caleta Buena.* The failure to provide that cargo was the default of the charterers. When the master of the vessel demanded the cargo, the charterers had none. *Their cargo had been contracted for, but had not been delivered to them.* They could not obtain possession of it."

You accordingly held that the charterer was liable for any delay suffered by the vessel. A like ruling was made by the House of Lords in the case of *Ardan S. S. Co. v. Weir & Co.,* (1905) A. C. 501, Lord Davey saying:

> "It has frequently been laid down, and may be taken to be established law, that the mere existence of circumstances beyond the control of the shipper, which make it *impracticable* for him to have his cargo ready, will not *relieve him from paying damages for breach of the obligation.*"

A like ruling has been announced by the highest appellate court of Scotland in the case of *Gardiner v. Macfarlane,* (1893) 20 Sess. Cas. (4th Series) 414, Lord Trayner saying:

> "For the present case it has been clearly shown that the direct cause of the Lismore's detention was that the charterer had no cargo to give her. Now, the obligation to *have* or *provide* a *cargo* is *not a charter obligation.* The contract of charter party *presupposes* that the charterer *has a cargo* or will have a cargo *ready for the ship when the ship is ready for it,* and accordingly the charter party provides that the ship shall proceed to a certain port and there 'take on board' or (as in this case) there 'receive' a cargo from the charterer."

The Circuit Court of Appeals for the Second Circuit agrees with our contention. In the case of *Atlantic & M. G. S. S. Co. v. Guggenheim,* 147 Fed. 103, the charter party provided that the cargo should be loaded on a vessel as fast as the vessel could receive the same. The Court said:

> "The respondents seek to construe the charter as if it read: 'The coke is to be loaded on board the vessels as fast as it is received at the wharf of the Louisville & Nashville Railroad Company at Pensacola.' It is enough that it does not so read. *The respondents covenanted to supply the schooners with cargo;* it was their duty to do so; they failed in this duty and the failure was the sole source of the demurrage."

In Scrutton on Charter Parties, 9th Ed. Art. 42, page 128, it is said:

> "In the absence of express stipulations qualifying it, the duty of the charterer to furnish a cargo according to the charter is absolute. The

charterer therefore will not be relieved from his express contract to load in a fixed time, or *from his implied contract to load in a reasonable time,* by *anything* preventing him from *bringing* a full and complete cargo to the place of loading."

STRIKE CLAUSE NO DEFENSE.

Now this *absolute* duty may be modified, it is true, by exception clauses in the contract, but as the shipowner has no possible means of preventing or lessening delays arising in the procuring of the cargo the exception clauses must, unless the contract intention is *clearly expressed,* relate to the *actual loading only.*

In *McLeod v. 1600 Tons of Nitrate of Soda,* 61 Fed. 849, 853, you said:

"But it is contended in the second place that, while there may have been no interference with the act of loading, the delay is nevertheless excused by virtue of the last clause of the charter party, whereby the performance of all the charterers' covenants, including the covenant to 'furnish and provide a cargo' is excused if prevented by 'political occurrences,' etc., and that, if the charterers are excused from furnishing a cargo, they are likewise excused for delay in loading, since the cargo must be *furnished* before it can be *loaded.* It is sufficient to say in answer to this argument that no political occurrence is shown in this case which would serve to

release the charterers from the performance of any of their covenants. The substance and effect of the covenant to provide and furnish a cargo was that the charterers would deliver a cargo within reach of the ship's tackle, for the purpose of loading. They did not covenant to purchase or acquire a cargo. *With the procurement of the cargo,* the shipowner had no concern. The charterers were to provide a cargo, and the owner was to provide a ship. *In such a case the charterer may be presumed to have his cargo under control.* If a political occurrence should prevent him from delivering a cargo or moving a cargo, the excuse contemplated in the charter party would exist; but when the intervention of the political occurrence is *carried further back,* and is made to apply to the *procurement* of a *cargo in the market,* the *contingency* is *too remote* to have been contemplated by the parties, unless the language of the charter party so expresses by *clear and unmistakable terms.*"

The foregoing statement concurs with all authority.

In the case of *Grant and Co. v. Coverdale, Todd and Co.,* decided by the House of Lords in March, 1884, 9 A. C. 470, the Lord Chancellor said:

"No doubt for the purpose of loading the charterer must also do his part; *he must have the cargo there to be loaded,* and tender it to be put on board the ship in the usual and proper manner. Therefore, the business of both parties meets and concurs in that operation of loading. When the charterer has tendered the cargo, and when the operation has proceeded to the point at which the shipowner is to take

charge of it, everything after that is the shipowner's business, and everything before the commencement of the operation of loading, those things which are so essential to the operation of loading that they are conditions *sine quibus non* of that operation, everything before that is the charterer's part only. It would therefore appear to me to be most unreasonable to suppose, unless the words make it *perfectly clear* that the shipowner has contracted that his ship may be detained for an unlimited time on account of impediments, whatever their nature may be, to those things with *which he has nothing whatever to do, which precede altogether the whole operation,* which are no part whatever of it, and are perfectly distinct from it, but *belong to that which is exclusively the charterer's business.* He has to *contract* for the *cargo,* he has to *buy* the *cargo,* he has to convey the cargo to the place of loading and have it ready there to be put on board, and it is only when he has done those things that the duty and the obligation of the shipowner in respect of the loading arises. These words in the exception are as large as any words can be. They mention 'strikes, frosts, floods, and all other unavoidable accidents preventing the loading.' If, therefore, you are to carry back the loading to anything necessary to be done by the charterer in order to have the cargo ready to be loaded, *no human being can tell where you are to stop.* The bankruptcy, for instance, of the person with whom he has contracted for the supply of the iron, or disputes about the fulfillment of the contract, the refusal at a critical point of time to supply the iron, the neglect of the persons who ought to put it on board lighters to come down the canal for any distance, or to be brought by sea, or to put it on the railway, or bring it in any other way in

> which it is to be brought. All those things are of course practical impediments to the charterer having the cargo ready to be shipped at the proper place and time, but is it reasonable that the shipowner should be held to be answerable for all those things, and is that within the natural meaning of the word 'Loading'? Are those things any part of the operation of loading?"

It is true that in that case the language of the charter party was that frosts, floods, or any other unavoidable accidents preventing the loading and unloading were excepted, and that it might be argued that the introduction into the charter party of the words "loading" and "unloading" clearly showed that the exceptions only applied to the work of loading or unloading. We have pointed out however, that "The exceptions usually contained in a charter party are, *unless the contrary intention is clearly expressed,* to be understood as applying *only to the actual loading.* They do not, therefore, protect the charterer against the consequences of delay or failure in matters which precede the loading and form no part of it." Halsbury's Laws of England, §286.

Moreover, in the *McLeod Case* you, in referring to the case of *Grant & Co. v. Coverdale, Todd & Co.,* said:

> "The agreement in that case referred to *delay in loading only,* but the *reasoning* contained in the decision is applicable to the case at bar." (61 Fed. 854.)

Now, there is nothing in the language of the charter party in this case which can refer to the cutting of the timber and the sawing of it into lumber. The use of the phrase "accidents on railways" might be held to refer to the transportation of the sawn lumber to the point of actual loading. It certainly cannot refer, however, to a strike in a lumber camp which has made it impossible to cut down the trees. If it can, then it could be fairly argued that a fire in a plant engaged in the furnishing of saws for the cutting of timber would relieve the charterer from the absolute duty imposed upon him of procuring a cargo, a duty not imposed upon him by the charter party, but imposed upon him by law. Moreover, it will be remembered that the charter party in this case was prepared by Hind, Rolph & Company. The printed blank which was filled out in this case is a blank *prepared* and *printed* by Hind, Rolph & Company, and if there is any doubt as to the meaning of the terms employed, the instrument is to be construed against the charterers.

In *Dampskibsselskabet Danmark v. Paulsen & Co.* (1913) Sess. Cas. 1043, the Court said:

"It is, of course, well-settled law that (to use the often quoted words of Lord Blackburn in *Postlethwaite v. Freeland*) 'in the absence of something to qualify it, the undertaking of the merchant to furnish a cargo is absolute.' If he fails in that undertaking, he will certainly, apart from special contract, be liable in demurrage. For the contract one must look to the charter-party; and though, of course, a charter-party may be so framed as to exempt the charterer, under specified circumstances, from his absolute legal obligation, I think the exemption must be *expressed in very clear language*. The contract must, I apprehend, be *strictly* read. The Court will *not lightly* infer that the shipowner has agreed to relieve the charterer from liability for delays which he (the owner) *has no possible means of preventing or lessening;* still less for delays which the charterer himself could, by due diligence, have avoided."

See also:

Ardan S. S. Co. Ltd. v. Mathwin (1912) Sess. Cas. 211.
Halsbury's Laws of England, §286.
Carver on Carriage by Sea, 6th Ed., §257.
MacLachlan on Merchant Shipping, p. 582.
Am. & Eng. Enc. of Law, 2nd Ed., Vol. 9, p. 245.

OTHER HINDRANCES.

Appellants further contend that if the word "strike" as used in the exception clause in the charter party does not exonerate them from delay caused

by a strike in the logging camps or lumber mills of Puget Sound, nevertheless another phrase in the exception clause, to-wit, "or any *other* hindrances beyond the control of either party to this agreement or their agents," does relieve them. We have shown, we think, that the entire exception clause relates only to the actual loading of the cargo. This, we think, would be sufficient to dispose of this objection, but there is another principle which is fatal to appellants' contention: The words above quoted are to be construed on the *ejusdem generis* principle.

In Halsbury's Laws of England, Vol. 26, p. 139, it is said:

> "General words, if preceded by words of more specific application, are to be construed as limited to things *ejusdem generis* with those which have been specifically mentioned before."

In *Gardiner v. Macfarlane,* 20 Rettie, p. 414, Lord Trayner said:

> "The exception clause in this charter is a very *broad* one, but the defenders cannot defend this claim or excuse the detention of the ship on any of the special grounds set forth in the clause. They rely on the concluding general words, 'or any other hindrances of what nature soever beyond the charterers' or their agent's control.' These general words, however, do not appear to me to afford to the defenders the defence they found upon them. Words of a general nature such as these now under consideration are generally restricted in their ap-

plication to causes of a like kind to those previously enumerated, and so reading them they will not in this case cover the cause of the ship's detention. But reading them in the *widest* sense they only cover causes which conduce to the *failure* of the *charterers' obligations under the charter.* For the present case, it has been clearly shewn that the direct cause of the 'Lismore's' detention was that the charterers had no cargo to give her. Now, the obligation to have or provide a cargo is not a charter obligation. The contract of charter-party presupposes that the charterer has a cargo, or will have a cargo ready for the ship, when the ship is ready for it, and accordingly the charter-party provides that the ship shall proceed to a certain port, and there 'take on board' or (as in this case) there 'receive' a cargo from the charterer. * * * If, therefore, the *providing* of the *cargo* is *not* a *charter obligation,* the exception clause does not cover it, nor afford any exemption from liability in respect of its non-performance."

See also:

Hutchinson on Carriers, 3rd Ed., p. 933.
Thorman v. Dowgate S. S. Co., 11 Asp. 481, 484, 485.
Owners of Steamship Knutsford v. E. Tillmanns & Co., 11 Asp. 105, 111.
Re Arbitration between Messrs. Richardson and Samuel and Co., 8 Asp. 331.
Mudie v. Strick & Co., 14 Comm. Cas. 135.
Carver on Carriage by Sea, 6th Ed., §258a.
Lewis' Sutherland on Statutory Construction, §§422 *et seq.*
Endlich on Interpretation of Statutes, §§405 *et seq.*
Hadjipateras v. Weigall & Co. (1918) Weekly Notes, p. 113.

Moreover, apart from authority, how can this general phrase aid the appellants in this case? The word "strikes" either relates to *loading only* or it relates to all strikes, namely, strikes affecting the bringing of the cargo into existence as well as the loading of the cargo. But if the word "strikes" covers *all* kinds of strikes, then the general clause certainly does not relate to strikes, for strikes are already covered. If, however, the word "strikes" covers strikes occurring only in connection with the actual loading of the cargo, then under the *ejusdem generis* principle the general clause must also relate to hindrance in the operation of loading.

In the case of *Abchurch Steamship Co. Ltd. v. Hugo Stinnes,* 1911 Session Cases, p. 1010, Lord Kinnear, in commenting upon a clause similar to the one here involved, said:

> "As to the second ground for restriction of the general words, it was argued that the causes specifically enumerated are not of one *genus,* and that, therefore, the rule cannot be applicable to the general words, because we cannot find one common characteristic of the enumerated causes. I do not think that is sound, because, in the first place, the general words must be subject to some restriction since they are expressly brought into the clause to provide for exceptions, and not for a general rule. *And if they were to be interpreted in their most uni-*

versal sense, the specific enumeration of exceptions would be futile, and the general rule would be swept away—there would be no meaning in it. The clause, in that view of it, would have been properly framed by excepting all causes of detention except the fault or negligence of the charterer."

See also:

Jenkins v. L. Walford (London), Ltd. 87 Law Journal, (K.B.) p. 137.

In order to escape the force of these authorities, counsel now contends that the case of *Larsen v. Sylvester,* 11 Asp. 78, decides that the general phrase is not to be construed on the *ejusdem generis* principle. (Appellants' Brief, p. 36.)

The exception clause under consideration in that case was as follows: "Frosts, floods, strikes, lockouts of workmen, disputes between master and men, and any other unavoidable accidents or hindrances *of what kind soever* beyond their control preventing or delaying the *working,* loading or shipping of the said cargo." The House of Lords held that in view of the above language the charterer was relieved from liability not only by hindrances *ejusdem generis* with frost, floods, etc., but by any hindrance *of what kind soever* which prevented the working, loading or shipping of the cargo. The charter party

here involved, however, does not except any hindrance *of what kind soever*. If the view of counsel for appellants is correct the words "of what kind soever" are surplusage and are not the basis of the court's decision. These words, however, were not surplusage. They were the *ground of decision in that case*. In the Divisional Court, Phillimore said:

> "It seems to me plain that, when people say 'accidents or hindrances *of what kind soever*' they mean that which they appear to say—that is, all other accidents or hindrances, and not merely those *ejusdem generis* with those mentioned."

On appeal the Lord Chancellor said:

> "It is sufficient for me to say that in the case of *Earl of Jersey v. Guardians of the Neath Union* (22 Q.B. Div. 555) Fry, L.J., referred to words of a very similar kind, and indicated what, I think, is perfectly true—namely, that you have to regard the intention of the parties as expressed in their language, and that words such as these, 'hindrances *of what kind soever,*' very often are intended to mean, as I am sure they are in this case intended to mean, exactly what they say."

Lord Ashbourne said:

> "When parties put in words of that kind, which are obviously of considerable width, and put them in after consideration, not stopping short at any ordinary general term, but putting in 'hindrances *of what kind soever* beyond their

control,' it is obvious that the more natural construction would be to assume that they meant something operative and did not mean to use blind words to be dismissed by the phrase that they were only *ejusdem generis.*"

Lord Robertson said:

"I base my judgment solely upon this: The parties, I think, have realized, or at least may well be held to have realized, the applicability of that rule to such contracts and they insert these words *'of what kind soever'* simply for the purpose of excluding that rule of construction."

In *France, Fenwick & Co. v. Philip Spackman & Sons,* 12 Asp. 289, 291, Bailhache, J. said:

"I do not intend to go at length into the cases, which during the last few years, have dealt with the *ejusdem generis* rule of construction; it is sufficient for me to refer to *Larsen v. Sylvester* and *Thorman v. Dowgate Steamship Company.* In the former of these cases the general words were *'of what kind soever,'* and the House of Lords held that by the use of *those words* there was a sufficient expression of intention to exclude the ordinary *ejusdem generis* rule. In *Thorman Dowgate Steamship Company* the general words were *'any* other cause,' and Hamilton, J., decided that there was no sufficient indication to override the well-known *ejusdem generis* rule."

See also:

Thorman v. Dowgate Steamship Co. Ltd., 11 Asp. 486.

Sec. 258, Carver's Carriage by Sea (6th Ed.), last paragraph, and Note F to Sec. 165.
MacLachlan on Merchant Shipping, p. 584 (5th Ed.).

REASONABLE TIME CHARTER-PARTY.

Counsel for appellants asserts that under the form of charter-party in this case the charterers were not bound to have a cargo ready for the ship when the ship was ready for the cargo, but that the charterers were bound to exercise due diligence only to see that a cargo was brought into existence. The reasons assigned for this contention are:

(1) The agreement of the captain to give a demurrage release;

(2) That the charter-party contains no provision for lay days nor does it fix the exact date on which loading is to begin.

(1) We have heretofore set forth in too abundant detail the conditions under which the Captain agreed to sign the demurrage release. We say now only this—we think it absurd that the act of the Master, an act wholly unauthorized and promptly repudiated by the ship owner, can change the contract of the parties. The determination as to whether there was any valid excuse for the delay rested not with the Master but with Mr. Ostrander.

The discussion which follows is to be considered not only as an answer to the contentions made by the appellants in this case, but also as a reply to the contentions which we think they will advance in the appeal taken by us. As a matter of fact there is no need, so far as this appeal is concerned, to discuss the law relative to a reasonable time charter-party. We say this because the evidence in this case discloses that the delay experienced by the boat after it arrived at Port Angeles was not due to a strike or to commandeering of the Mill Company's yard by the Government. The trial court so found. (441-445.)

Pretermitting, however, at this point any discussion of the facts, we shall consider the legal contentions advanced by appellants at Page 32 of their brief.

(2) It is asserted that the charterers are not liable for the delay between October 18th and November 24th because by agreement of the parties the commencement and duration of lay days was intentionally left undefined, and that as a corollary thereof the charterers had a reasonable time in which to do their work, which work was the bringing of the cargo into existence. It is true that if no fixed time for loading is specified in the charter-party, the law gives the charterer a reasonable

time in which to perform *the actual work of loading,* but this is a very different thing from saying that the charterer can, unless by a clear clause in the charter-party, be excused from delay in bringing cargo into existence. It is also true that the charter-party in this case does not expressly prescribe when the lay days shall commence, nor does it provide that the loading shall be accomplished in a certain number of days. But the charter-party is not *wholly destitute of terms relative to the commencement of lay days.* It does provide that lay days shall not commence before the first day of July, 1917, unless at charterers' option. (14) It also provides that if the vessel does not arrive at the port of loading before noon of 31st day of August, 1917, the charterers have the right to cancel the charter party. (14) In other words, the charterers inserted a provision that the lay days should not commence *before the first of July.* They also provided that if the vessel was not ready to load by *August 31st,* the charter, at their option, might be cancelled. The charter party, therefore, we think, clearly contemplated that lay days should commence some time in *July* or *August.*

Maugre this, we say again that even in a reasonable time charter party the charterer is excused for delay in *actual loading only.*

In Scrutton on Charter Parties, Ninth Edition, page 321, it is said:

> "*If no fixed time for loading* (or unloading) is stipulated in the charter the law implies an agreement on the part of the charterer to *load* or *discharge* the cargo within a reasonable time, and, so far as there is a joint duty in loading or unloading, that the merchant and shipowner shall each use reasonable diligence in performing his part.
>
> "In the absence of express provisions, there is an *absolute undertaking* on the part of the charterer *to have cargo ready* to load, and a reasonable time for *loading THEN* begins. On a like principle, at the other end of the voyage, what is in question is the reasonable time for discharge. Therefore difficulties in getting the cargo away to an ulterior destination after the *actual discharge* are not to be taken into account."

In Carver on Carriage of Goods by Sea, Sixth Edition, Section 617, it is said:

> "But though the charterer, where no time is fixed for loading or unloading, does not come under any obligation to have the work completed in any particular time, and is excused if the work is delayed by causes beyond his control, *he will not be excused for delay caused by failure to have the cargo ready.*
>
> "Unless expressly excused, the charterer is bound, *so far as provision of the cargo* is concerned, to be *ready to proceed with the work without delay.* The cargo must be *ready* at the *proper place for loading.* The charterer cannot

> set up the excuse of *vis major* for delay in these matters."

Judge DeHaven announced the same doctrine in the case of the *Schooner Mahukona Co. v. 180,000 Feet of Lumber,* 142 Fed. 578, at page 582:

> "But the rule of reasonable diligence, when that is all that is called for by the contract, is not applicable to a contract of charter by which the *charterer has bound himself to furnish a cargo* and have it ready for delivery to the vessel. This distinction is noticed in Section 617 of Carver's Carriage by Sea, in which that author says: (Quoted above)
>
> "It necessarily follows, from what has been said, that the charterer was in *default in not having a cargo ready for delivery* so as to give the vessel reasonable dispatch."

In the case of *Postlethwaite v. Freeland,* 5 A. C. 599, 4 Asp. 302, it was held that the charterer was not liable for the delay in the *actual discharge* of a vessel due to his inability to procure a sufficient number of lighters to take the cargo from the vessel. Lord Blackburn, however, in his opinion pointed out that while a charterer might be relieved from liability for delay in the *actual discharge* of the vessel, nevertheless he *was not relieved* from liability for any delay in the *loading* of the vessel *due to the charterer's failure or inability to provide a cargo.*

After quoting the statement of Lord Ellenborough that "The merchant is the adventurer who chalks out the voyage, and is to furnish at all events, the subject-matter out of which the freight is to accrue," Lord Blackburn continues:

> "I am not aware of any case contradicting the doctrine that, in the absence of something to qualify it, the undertaking of the merchant to furnish a cargo is absolute. And if the obtaining lighters or other customary appliances for the discharge of a ship on its arrival was *like the procuring a cargo for loading the ship,* a matter which fell entirely on the merchant, so that he might choose his own mode of fulfilling it, I am not prepared to say that on the same principle he ought not to be held to undertake, without qualification, to provide those appliances. * * * But I do not think that the undertaking to supply lighters or other appliances to assist in discharging the ship does fall within the same principle as the *undertaking to supply a cargo.*"

In the case of *Gardiner v. Macfarlane* (1893), 20 Rettie 414, the Court said:

> "I am of opinion that difficulty in obtaining a cargo on account of the output at the colliery which the charterers had selected being restricted is a matter with which the shipowners are not concerned, and *the consequence of any delay arising therefrom must fall on the charterers.*"

Moreover the House of Lords in the case of *Ardan Steamship Co. v. Weir & Co.* (1905), A. C.

501, 10 Asp. 135, 11 Com. Cas. p. 26, expressly approved the above statements made in the cases of *Postlethwaite v. Freeland* and *Gardiner v. Macfarlane.*

Now the charter parties involved in the cases just cited contained provisions almost identical, as to lay days and time of commencement of loading, with the provision of the charter party in the case at bar.

In the case of *Schooner Mahukona Co. v. 180,000 Feet of Lumber,* 142 Fed. 578, Judge DeHaven said:

> "The contract of charter contained no express provision in relation to lay days, nor any stipulation fixing the time within which the vessel was to arrive." (Top of page 579.)

and again:

> "The contract contained no stipulation for lay days, and fixed no time within which the vessel was to arrive and be ready to receive her cargo." (Middle of page 581.)

In that case, we may say, the schooner at the time of the execution of the charter party was bound on a voyage from the Philippine Islands to Puget Sound. Her arrival at Puget Sound was certainly as indefinite as the time when the Schooner Ostrander would be completed. Owing to storms and stress of weather the "Mahukona" did not

arrive for a period of *over sixty days* after her expected due date. She was posted at the Merchants' Exchange in the City and County of San Francisco as *lost*. Charles Nelson Company thereupon procured another vessel to take the cargo provided for the "Mahukona" at Everett, and then claimed that when the "Mahukona" finally arrived at Everett the mill to which she was dispatched had no lumber on hand and was shut down to make necessary repairs; that after her arrival at Everett they, with due diligence, caused sufficient lumber to be manufactured to furnish a cargo for her. Judge DeHaven, however, held that the undertaking of Charles Nelson Company to supply a cargo was absolute and that the charterer was liable for the delay incurred by the vessel in awaiting the manufacture of the cargo.

In *Gardiner v. Macfarlane,* 20 Rettie, 414, the charter party contained a cancellation clause similar to the one in the charter party involved in the case at bar. Lord Trayner said:

> "The charter party was entered into in *March,* 1888, at Glasgow, and (from the clause authorizing the charterers to cancel it 'if vessel do not arrive at Sydney on or before 30th *September,* 1888') it may be inferred that the 'Lismore' *was expected to be at Sydney at latest before end of September.*"

In that case, therefore, liability was cast upon the charterer by reason of his failure to have a cargo ready for the ship.

In the case of *Ardan S. S. Company v. Weir & Company,* Vol. 6, Court of Session Cases (5th Series,) page 294, affirmed by House of Lords (1905) A. C. 501, the provision in the charter party was as follows:

> "Should steamer not arrive at her loading port and be ready to load on or before the 15th July charterers to have the option of cancelling this charter; lay days not before 25th June."

The charter party did contain a provision as to the *time in which* the cargo was to be *discharged,* but "there was *no* provision as to the *time within which* the ship was to be *loaded.*" 6 Sess. Cas. (5th Series) 294.

The provision, therefore, in the charter party involved in the *Ardan* case is identical with the provision in the charter party involved in the case at bar. The charterers in the Ardan case were held liable for their failure to have a cargo ready for loading, and if that decision is right the charterers in this case should also be held responsible.

The authorities cited by appellants and asserted as laying down a contrary rule are entirely consistent with our position. We have already quoted

from Section 617 of Mr. Carver's work on Carriage by Sea. Section 610, quoted by appellants in their brief at page 19, is in harmony with the position which we have taken. The work to which Mr. Carver refers in Section 610 is not the charterer's work of *preparing and procuring* the cargo, but is the work of *actual loading.* A mere reading of the first paragraph in Section 610 and Section 611 will show that we are correct. The work therein referred to is the work of actual loading. Again, in Section 615, Mr. Carver is discussing the responsibility, or lack of it, on the part of the charterer in the *actual loading* of the vessel.

The case of *Empire Transportation Co. v Philadelphia Co.,* 77 Fed. 919, is also not in point. In that case it was sought to hold the charterer liable for a delay in the work of discharging the boat. The delay was due to a strike. We have no quarrel with the proposition that in a reasonable time charter party the charterer is relieved from any delay either in the actual *loading* or *unloading* of the boat when such delay is occasioned by a strike. The delay in this case, however, was not due to a strike which hindered the loading, but if the strike affected the matter at all it affected the preparation and procuring of the cargo.

The case of *Richland S. S. Co. v. Buffalo Dry Dock Co.,* 254 Fed. 688, relates to a delay in the repair of a vessel. A mere reading of that case will convince that it is not applicable here.

It is, however, argued that the cargo was to be procured from a *particular place* and that the parties to the contract contemplated that the procuring of the cargo from such place might be delayed. The evidence in this cause does not support such assertion and the case on which reliance is placed, *Jones, Ltd. v. Greene & Co.,* 9 Asp. 600, 9 Com. Cas. 20, is not in point. That case was an exceptional one and has always been so regarded.

The charter party there in dispute provided that "the ship shall with all possible dispatch proceed to such loading *berth* as freighters may name at Newcastle, New South Wales, *and after being in a loading berth as ordered,* wholly unballasted and ready to load, shall there load in the usual and customary manner a full and complete cargo of ..... coals, as *ordered* by charterers, which they bind themselves to ship." It will be noticed, in the first place, that the charterers had a right to ship a *certain specific kind* of *coal.* Shortly after the execution of the charter party they elected to ship a coal called "Wallsend coals." It was *known* both to *shipowner* and charterer *at the time*

of the execution of the charter party "that the port of Newcastle, New South Wales, serves a limited number of collieries which are adjacent to that port, and serves no other collieries whatsoever. The whole of the coal which is loaded at Newcastle, New South Wales, is the coal which is the product of these collieries. It was known also to both the parties to the contract that the output of these collieries was a very limited output, not exceeding 1100 tons a day; and also that if sailing ships went to this port of Newcastle, New South Wales, the loading would have to take place according to the regulations of the port there, and that a ship could only get a loading berth if what is called a 'loading order' had been obtained from the colliery—that is to say, if the circumstances were such that according to the colliery turn that vessel was entitled to have such loading order. It was also *known* to *both* of the parties here that *sailing ships undoubtedly were detained a very long time before they could in ordinary course get their loading order from the colliery. This very ship,* the *Snowdon,* in the year previous to the year of this charter party, had to wait *eighty-three days* in order to get a loading order according to the colliery turn."

Vaughan Williams, L. J., in distinguishing the facts in *Jones v. Greene* from those in *Kearon v. Pearson,* said that the distinction arose from the fact that in *Jones v. Greene* the *precise colliery* from which the coal was to come was *expressly defined.*

> "When that is so," he said, "I think it is impossible to lay down an absolute rule that the charterer undertakes an unqualified obligation to have the cargo ready whenever it may be reasonably expected that there may be a berth for the ship if the cargo is ready. *It may be so sometimes,* but it is impossible to say that it must be so. Now, in the present case, what is the contract so far as the source of coal is concerned, and what is the knowledge of the parties to the contract? I take it that one cannot exclude the knowledge of the parties in the consideration of this matter, because, after all, what we have to consider here is, what was a reasonable time either for the provision of the cargo or for the commencement of the loading, and, when you are considering what is a reasonable time, it seems to me obvious that you must take into consideration those circumstances, *which were known* to both parties to the contract *at the date of the contract,* and were taken into consideration by both the parties as affording the basis and foundation of the contract."

He then sets out the knowledge which both parties to the contract had. Continuing, he says:

> "As the result of all that, I have come to the conclusion that *all* the parties to this contract *assumed* as the *basis* of the *transaction*

> that there *would* and *must* be more or less *delay,* according to the loading turn at the colliery. I have only one more word to say about this. It is true that the correspondence took place between the parties after February, which was the date of the charter-party, still, when it is considered, I cannot help seeing from that correspondence that the charterers and shipowners, both of them, were *contracting* in view of this state of things; and really as time went on and it came to the knowledge of the parties that there was likely to be a long 'stem,' as it is called in the correspondence, both parties assume that this long 'stem' is a *burden* which *both* will have to bear, and that neither party takes upon himself the risk of the long 'stem'; and, eventually, when it is certain that the waiting will be for a long time, the shipowners write to the charterers to ask the charterers to try, *as a matter of grace,* if they can get the purchasers of the cargo, who had purchased Wallsend, to change it to some other coal, and, although the charterers did their best, they were unable to effect this. It seems to me that all these things which I have referred to clearly bring this case within the authority of Harris v. Dreesman."

Lord Romer and Lord Stirling both concurred, both citing as authority for their position the case of *Harris v. Dreesman* and the case of *Little v Stevenson.*

Now, the cases of *Harris v. Dreesman,* 23 L. J. 210, and *Little v. Stevenson,* 74 L. T. Rep. 529, 8 Asp. 162, are exceptional cases and have always been so considered.

In *Harris v. Dreesman* it appears that on the day the charter party was signed, the master of the vessel went with the defendant Taylor to the office of the colliery at which the ship was to be loaded, where they were told that an accident had happened to the boiler of the steam engine in the colliery, in consequence of which the colliery was off work, and that the "Julianna's" turn would be a few days after the colliery got to work, which was expected would take place in the middle of the following week. *After* this conversation took place and the captain was advised that no cargo was or could be had until the engine was repaired, *the defendant Taylor signed the charter party.* It took somewhat longer, however, to repair the engine than was anticipated, but the vessel was loaded in her turn after the engine started. The lower court held the charterer liable for the delay. On appeal the Court said that the evidence was deficient in that it did not show either that the boiler was repaired and the colliery got to work within a reasonable time after the charter party was executed or that the vessel was loaded within a reasonable time after the colliery got to work. The Court further held that if it was found that both of the above mentioned acts were done within a reasonable time, the charterer was exempted; but that if the

repair was not made within a reasonable time or the boat not loaded within a reasonable time after the repair was made, then, in either event, the charterer was liable.

In *Little v. Stevenson,* the charter party provided that the ship should proceed to Bo'ness and receive a cargo of coals to be supplied by the charterers, "lay days to count from the time the master has got the ship reported berthed and ready to receive cargo." The ship reached Bo'ness on the 19th of October, and the charterers were informed of the fact. In consequence of the crowded state of the docks she was not allowed to enter in her ordinary turn until the 26th. She was loaded within the time allowed by the charter party and sailed on the 28th. The claim for demurrage in that case, however, was based upon the fact that a berth in the dock happened to become vacant, *accidentally,* on the 21st, and that if the cargo had been ready the ship could have been berthed on that day *out of her turn.*

It is obvious that the shipowner in that case could recover only in the event that it was the duty of the charterer to have a cargo ready if what the Court denominated "a *remote* and *improbable contingency*" should happen.

That our construction of the case of *Little v. Stevenson* is correct is shown from the following language in the opinion of Lord Halsbury in the case of *Ardan Steamship Co. v. Weir & Co.* He said:

> "I am very sorry if any observations of mine or of the late Lord Herschell's have been supposed to throw any doubt upon so well recognized a principle of commercial law as that a merchant is under an absolute obligation to supply the cargo. The case which is supposed to have created the doubt is *Little v. Stevenson,* and the passage referred to begins: 'The proposition of law that I disputed was that a merchant must be always ready with his cargo at all times and in all places, and under all circumstances, to take advantage of any *such contingency, if it should arise.*' And Lord Herschell observed: 'It is alleged that the obligation existed in point of law, that at all ports, under all circumstances, however *unreasonable* it might be to *anticipate* such a *contingency,* however deficient the quay might be in the means necessary for storing, or protecting, or preserving cargo, whatever difficulties there might be, in short, that was an obligation always resting upon the shipper.' I thought then, and I think still, that, to use Lord Herschell's language, such an obligation on the shipper would be most unreasonable. But what relevancy had such a case to the case before your Lordships? The controversy turns, as the Lord Ordinary finds, upon the true construction of the charter-party in view of the facts as proved. I also agree with the Lord Ordinary that delay in the loading is one thing, and the failure to provide a cargo to load is another and a

> very different thing. He found as a fact that the failure of the defenders to perform their primary duty of providing a cargo was the cause of the delay."

Now returning to the case of *Jones, Ltd. v. Greene & Co.,* how does that case avail appellants here? In that case the charterer had an option to provide a particular and specific kind of coal. The shipowner knew that the output of that particular colliery was limited. He knew that by the regulations of the port of Newcastle he could not get a loading berth until a loading order had been obtained from the colliery. He knew that sailing ships were detained at Newcastle a very long time before they could get their loading order from the colliery. He knew that his own ship had been detained at Newcastle the year before for a period of eighty-three days in order to get a loading order according to the colliery turns. He knew this when the contract was executed. After the execution of the contract and after the arrival of the boat at Newcastle a correspondence took place between the parties, which the Court says shows that a long stem at Newcastle was a burden which both parties would have to bear.

But what did Mr. Ostrander know? The charter party was executed in May. There was no strike in May. He knew that the charter party provided

that the charter could be cancelled on August 31st if he was not ready. He knew that Hind, Rolph & Company should be expected to have the cargo ready any time after July 1st. He knew that they regarded the boat as one sailing in July or August (Libelant's Exhibit 1-C). He knew on May 26th, that the contract for the purchase of the lumber had already been made. (Libelant's Exhibit 1-B.) He knew that the cargo, if not already cut, could be cut by several mills on Puget Sound in from ten to fourteen days. He did not know that a strike would occur. He did not know that any delay would occur. He did not know of the business method and practices of the Charles Nelson Company,—methods and practices denominated by Hind, Rolph & Company, in one instance at least, as "very unjust and highhanded procedure," methods and practices which Hind, Rolph & Company were compelled, in other instances, to repudiate.

Moreover, it will be noticed that the case of *Ardan Steamship Co. v. Weir & Co.,* 10 Asp. 136, was an *appeal* from the First Division of the Court of Sessions in Scotland. The basis of the decision of the Court of Sessions was the opinion of Vaughan Williams in the *Jones Case.* The opinion in the *Jones Case* was *pressed* upon the House of Lords in the *Ardan Steamship Co. Case.* Lord Halsbury,

without mentioning the *Jones* decision, referred to it in the following language:

> "I think it quite immaterial to discuss cases in which it is either proved or assumed that there are particular circumstances known to both the parties, with reference to which they may be supposed to contract, which may affect both the providing and the loading of the cargo. It is enough to say that no such question arises here."

Lord Davey said, after referring to the case of *Harris v. Dreesman*:

> "I think that the opinion of the Lord President was founded on some such consideration. His Lordship thought that there were circumstances in this case known to both parties which prevented the obligation of the charterers possessing the absolute character alleged. The learned judge referred to the evidence on cross-examination of Mr. Clark, a member of the firm who were managing owners of the vessel and effected the charter-party with the respondents for this voyage. Mr. Clark appears to have had some previous experience with regard to sailing ships loading cargoes of coal at Newcastle; but he did not know with what colliery the respondents would make arrangements, and, in fact, he did not know the various collieries at Newcastle, and only knew some of them by name. But even if he must be taken to have known the usual and customary manner or the conditions of loading at the port, that is not the point. *The complaint here is not of delay in loading but of delay in procuring the cargo.*"

It will be remembered that in the case of *Jones v. Greene,* the vessel was to go to Newcastle. In *Ardan Steamship Co. v. Weir & Co.,* she was to go to the same port.

In both cases a *particular specific* kind of coal was to comprise the cargo. The delay arose from the same cause. Unless, therefore, the cases can be reconciled in some manner, the decision of the Court of Appeals in *Jones v. Greene,* has been overruled by the decision of the House of Lords in *Ardan Steamship Co. v. Weir.* It is immaterial to us which view is adopted. Mr. Scrutton apparently thinks that the *Jones Case* has been overruled, for he says:

> "It is very difficult to reconcile the decision of the House of Lords in this last case with that of the Court of Appeals in *Jones v. Greene.*" Note (h) to Art. 42, Scrutton on Charter Parties (9th Ed.).

If the cases are reconcilable, they are reconcilable only on the theory that the owners of the ship "Snowdon" *knew positively* at the time of the execution of the contract that a delay would take place, while the shipowners in the *Ardan Case* did *not positively* know such fact when the contract was entered into. This is the view of Mr. Carver. He says:

> "This (*Jones*) case was cited, but not discussed by, the House of Lords in *Ardan Steam-*

> *ship Co. v. Weir;* but, it seems, it can be distinguished from that case and justified on the ground that the special conditions, affecting the procuring of a cargo at the port, were *known* to both parties *at the date of the contract.*" Carver on Carriage by Sea, §254.

Appellants also take the position that the *Jones Case* decides that the charter party, in effect, provided that the cargo in this case was to be procured from the Puget Sound Mills & Timber Company at Port Angeles. Again the facts in the two cases differ widely. In the *Jones Case* the charterer had a right to prescribe that a particular and specific kind of coal should be loaded. This coal could, of course, not be obtained from but one place. The output of no two mines is alike. In the case of two mines side by side the coal produced by one mine may be far superior in heating capacity or in low percentage of ash to the other. If the charterer in a coal contract has the right to specify the particular kind of coal, he is under no obligation to furnish a cargo of another kind. If he does so it is only an *act of grace* on his part. But no such considerations are present here. Sawn lumber is sawn lumber and it makes no difference whence it is procured. The Ostrander cargo could have been procured from at least fifty mills. True, it was export lumber; but the testimony of Mr. Allen shows that there were a large number of mills in

the Puget Sound district capable of cutting export lumber. The South African purchasers of this cargo did not require that it be cut only at the Port Angeles mill. Moreover, Hind, Rolph & Company secured Mr. Ostrander's consent to a modification of the charter party so that the cargo could be cut at Mukilteo as well as at Port Angeles. And in all the correspondence down to October 12th it was stated that the cargo would be cut at both mills. The only reason that part of the cargo was not cut at Mukilteo was that the Crown Lumber Company was busy filling orders for vessels some of which were owned by Charles Nelson Company. (214.)

Again, in the case of *Gardiner v. Macfarlane* the charter party provided that the vessel should proceed to such *colliery* as *charterers* or their agents *might direct,* and there load a cargo of coal. The provision in this respect was like the charter party in the *Jones Case,* and unlike the charter party in the case at bar. The charterers in the *Gardiner Case,* as in the *Jones* and present case gave a prompt order to the manufacturers for the cargo. In the *Gardiner Case,* however, it is said:

> "The charterers appear to have informed their agents at Sydney without any loss of time that the charter-party had been entered into, for on 8th of May the agents wrote to

the colliery instructing them to book the 'Lismore' for a cargo of coals. But having thus ordered the coals for the 'Lismore,' as well as for two other vessels which were named, the agents seem to have thought that they had done all that could be required of them. And in ordinary circumstances, perhaps, no more would have been necessary to enable them duly to fulfill their obligation to load the 'Lismore.' They took no precautions, however, to secure that they would get coals for the 'Lismore' in due time, and took the risk of anything occurring which would prevent this. It is the chance so risked that has occurred.

"* * * In the second place, the fact (if it be a fact, which in this particular case is more than doubtful) that the charterer could not procure the commodity in the market (it not being there for sale), which he had bound himself to put on board the chartered vessel when that vessel was ready to receive it, is no excuse on the ground of 'hindrance over which he had no control,' for the non-performance of his obligation, any more than would be the excuse that having become bankrupt he had no money to purchase the commodity, it being procurable in the market."

In *Dampskibsselskabet Danmark v. Paulsen & Co.,* (1913) Sess. Cases 1043, the exception clause protected the charterer from strikes, etc., either preventing or delaying the *working,* loading or shipping of the cargo, but even under such a form of charter party the court made the following ruling:

> "Where there is, as here in fact, a delay in furnishing the cargo, I think the onus is on the charterer to prove not only that the delay arose from one or other of the specified causes which, by the contract of charter-party, are to form grounds of exemption, but also that he did all in his power, by way of reasonable precaution or exertion, to avoid it. *He is not entitled to fold his arms and do nothing, relying implicitly upon his clause of exemption.*"

THE INCLUSION IN THE CHARTER PARTY OF THE PROVISION THAT CHARTERERS WERE TO FURNISH THE CARGO CONSTITUTES NO DEFENSE

Counsel for appellants makes a still further argument. His contention, if we understand it, is as follows:

It was the *absolute duty* of the charterer to *furnish* a cargo, but the *time when* the cargo was to be furnished was to be determined in the light of the exception clause of the charter party. It is sought to distinguish the cases heretofore cited by us on the ground that in those cases the providing of the cargo was *not* a charter party obligation, while in the case at bar the procuring of the cargo *was* a charter obligation. (Appellants' Brief, 35.) The basis of this distinction is sought to be found in that clause of the charter party which provides

that "B. Said party of the second part doth engage to *furnish* to said vessel * * * a full cargo of sawn lumber." (11.)

It is inferentially, at least, argued that the charter parties involved in the cases of *Gardiner v. Macfarlane, Ardan S. S. Co. v. Weir,* and *McLeod v. 1600 Tons of Nitrate of Soda,* provided that the charterer agreed to load the cargo *whenever the ship should be ready to receive it,* (Appellants' Brief, 35) and that consequently the providing of the cargo was not subject to the exceptions of the charter.

We think that appellants' contention is wholly unsound, even if his statement as to the conditions in the various charter parties was correct. We need not explore this proposition, however, for the reason that the alleged distinction between the conditions of the charter party in the case at bar and in the cases heretofore cited by us *does not exist.* The precise contention made here was made only to be repudiated by this court in the *McLeod* case, 61 Fed, 849, 852. The charter party in that case provided that J. W. Grace & Company *"do engage to provide and furnish* the said vessel during the voyage aforesaid with a full cargo." Now, if the furnishing of a cargo is a charter obligation in the case at bar, it was equally a charter obligation

in the *McLeod* case. You said, however, that the delay in that case

> "arose from the fact that the *charterers had no cargo to load.* In entering into the charter party the shipowner placed his vessel at the disposal of the charterers for the stipulated time and voyage. *He had the right to rely upon the existence* of a *cargo ready for shipment* as soon as the vessel should arrive at Caleta Buena. The *failure to provide* that cargo was the default of the charterers. When the master of the vessel demanded the cargo, the charterers had none."

Continuing you said:

> "But it is contended in the second place that, while there may have been no interference with the act of loading, the delay is nevertheless excused by virtue of the last clause of the charter party, whereby the performance of all the charterers' covenants' *including the covenant 'to furnish and provide a cargo'* is excused if prevented by 'political occurrences,' etc., and that, if the charterers are excused from furnishing a cargo, they are likewise excused for delay in loading, since the cargo must be furnished before it can be loaded. It is sufficient to say in answer to this argument that no political occurrence is shown in this case which would serve to release the charterers from the performance of any of their covenants. *The substance and effect of the covenant to provide and furnish a cargo* was that the charterers would deliver a cargo within reach of the ship's tackle, for the purpose of loading. They did not covenant to purchase or acquire a cargo. With the *procurement* of the cargo, the *shipowner had no concern.* The *charterers* were to

> *provide a cargo,* and the *owner* was to *provide* a *ship. In such a case the charterer may be presumed to have his cargo under control.* If a political occurrence should prevent him *from delivering* a cargo or *moving* a cargo, the excuse contemplated in the charter party would exist; but when the intervention of the political occurrence is carried further back, and is made to apply to the procurement of a cargo in the market, the *contingency is too remote* to have been contemplated by the parties, unless the language of the charter party so expresses by *clear and unmistakable terms.*"

It is true that the case of *Gardiner v. Macfarlane,* 20 Rettie, 414, does hold that an obligation to provide a cargo is not a charter obligation, but the court in that case also said this:

> "But assuming that the *providing* of the *cargo* is an obligation *within* the *charter party* and *one to which the exception clause applied,* have the defenders brought themselves within the benefit of the exception? I think not. The charter party was entered into in March, 1888, at Glasgow, and (from the clause authorizing the charterers to cancel it 'if vessel do not arrive at Sydney on or before 30th September, 1888'), *it may be inferred that the 'Lismore' was expected to be at Sydney at latest before the end of September.* The charterers appear to have informed their agents at Sydney without any loss of time that the charter party had been entered into, for on 8th May the agents wrote to the colliery instructing them to book the 'Lismore' for a cargo of coals. But having thus ordered the coals for the 'Lismore,' as well as for two other vessels which were named, the agents seem to have thought that they had

done all that could be required of them. And in ordinary circumstances, perhaps, no more would have been necessary to enable them duly to fulfil their obligation to load the 'Lismore.' They *took no precautions, however,* to secure that they would get coals for the 'Lismore' in due time, and took the risk of anything occurring which would prevent this. It is the chance so risked that has occurred.

"* * * In the second place, the fact (if it be a fact, which in this particular case is more than doubtful) that the charterer could not procure the commodity in the market (it not being there for sale), which he had bound himself to put on board the chartered vessel when that vessel was ready to receive it, is *no excuse* on the ground of 'hindrance over which he had no control,' for the non-performance of his obligation, *any more than would be the excuse that having become bankrupt he had no money to purchase the commodity, it being procurable in the market.*"

In *Ardan S. S. Co. v. Weir* (1905) A. C. 501 the language of the charter party was that the 'Lismore' was to proceed to Sydney, N. S. W., "and there receive from the factors or agents of the said charterer a full and complete cargo of coals * * * *which the said merchants bind themselves to ship.*" We think it will be readily agreed that there is no difference between the obligation imposed on the charterer in the *Ardan Case* and the obligation imposed on the charterer in the case at bar.

See also:

Grant v. Coverdale, Todd & Co., 9 A. C. 470, 5 Asp. 353,
The India, 49 Fed. 76, 82,
Sorenson v. Keyser, 52 Fed. 163.

OUTPUT OF MILLS ON PUGET SOUND NOT AFFECTED BY STRIKE AFTER FIRST WEEK OF SEPTEMBER

We have hitherto assumed in this brief that there was a general strike in the Puget Sound district from July until the completion of the loading of the schooner, but in fact there was no such strike.

The trial court found that "the strike did not materially interfere with the output of the mills on Puget Sound after the *first week in September.*" (445.)

This statement is abundantly justified by the testimony. In fact the record shows that some of the largest mills in the Puget Sound district were cutting and shipping a large amount of export lumber even during the month of August. For instance, the Puget Mill Company, during the first two weeks in August, cut 3,500,000 feet and shipped, of *export* lumber, 2,260,000 feet. During the last two weeks of August the same mill cut 4,000,000 feet. During the month of September it

cut 7,500,000 feet and shipped, of *export* lumber 5,122,000 feet. In the month of October it cut 8,400,000 feet. (Libelant's 13.)

Again, take the Bloedel-Donovan Mill at Bellingham. During the month of October it cut 3,620,000 feet and shipped 2,859,000 feet of *export* lumber. In September it cut 11,537,200 feet and shipped 2,417,452 feet of *export* lumber and 190 car loads of lumber. In October the same mill cut 11,000,000 feet and shipped 3,526,000 feet of *export* lumber. (Libelant's 13.)

The greater part of the testimony in the record, other than documentary, relates to the two mills in the city of Tacoma. With reference to these two mills, at least, we think much might be said upon the proposition that there was not a strike at the mill of either company.

A strike is "a combined effort by workmen to obtain higher wages or other concessions from their employers by stopping work at a preconcerted time."

> *Bouvier's Law Dictionary, Rawle's 3rd Ed.* Vol. 3, p. 3159.

See also:

> *Longshore Printing & Pub. Co. v. Howell,* 38 Pac. 547, 551.

Iron Molders' Union v. Allis-Chalmers Co., 166 Fed. 45, 52.
Farmers Loan & Trust Co. v. Northern Pacific R. Co., 60 Fed. 803, 919.

A strike, therefore, involves a labor dispute between a body of workmen, employed by the same employer, and that employer. It does not embrace the quitting of work by employees through fear of violence or abuse by persons not connected either with employer or employee.

Halsbury's Law of England, Sec. 216.
Stephens v. Harris & Co., 6 Asp. M. L. C. 192.
Mudie v. Strick, 25 T. L. R. 453, 14 Com. Cas. 135.
Richardson v. Samuel (1898) 1 Q. B. 261.
Scrutton on Charter Parties, Art. 84.

Now, Mr. Doud, of the Defiance Mill of Tacoma testified that the employees of that mill did not make any demand upon the Mill Company. They simply walked out because they were afraid that they would be abused by men not connected with the Defiance Mill. (432.)

Mr. Griggs, the President of the St. Paul & Tacoma Lumber Company, testified as follows:

"We had a good loyal crew of men, but they were afraid to work." (282.)

But conceding there was a strike both at the Defiance Mill and at the St. Paul & Tacoma Lum-

ber Company's Mill, yet there was not a general tie-up of the lumber business even in the City of Tacoma.

Mr. Morrison testified that the Danaher Mill was closed down for the period of three days; that the mill then resumed operation and, so far as he could see, operated thereafter to full capacity. (388.) The confidential report made by the Danaher Lumber Company shows that Mr. Morrison's statement is correct. The normal cut of the Danaher Lumber Company's mill was 750,000 feet per week. That report shows that during the four weeks of the month of August, the Danaher Mill cut respectively, 646,000, 733,000, *761,000,* 702,000 feet; during the weeks ending September 1st, 8th, 15th, 22nd and 29th the mill cut respectively 770,000, 730,000, 720,000, 553,000, 637,000 feet; during October the actual cut of the mill for the weeks ending October 6th, 13th, 20th and 27th was respectively 703,000, 676,000, 608,000, 695,000 feet. (Libelant's 13.) We think it a reasonable inference from this testimony alone, and other testimony can be found in the record, that Hind, Rolph & Company might have procured a cargo for the Ostrander long before it was procured. The only reason why it was not secured was that prices for lumber had advanced. Mr. Virgin, of the Canal Lumber Com-

pany, testified that prices were advancing throughout the months of July, August, September and October. (350.)

Moreover, in the letter of August 20th, 1917, written in response to Mr. Ostrander's offer to cancel the charter party, Hind, Rolph & Company said:

> "We hardly think, however, that the buyers will agree to any cancellation, because since the cargo was sold *prices have somewhat advanced* and the purchase will no doubt turn out *very satisfactorily from their standpoint.*" (Libelant's 1-I.)

Counsel for appellants, however, says that even though the trial court may have found that the strike was over by the first week in September, yet nevertheless this court may conclude that the strike materially interferred with the output of the Port Angeles mill. (Appellants' Brief p. 30.) We think the evidence clearly disproves this assertion. Mr. Scott of Port Angeles admits that the mill could have cut more lumber for this cargo, but says that if it had the mill would have lost money. (238.) He admits also that if the logs had been sorted they could have cut 100,000 feet a day. (241.) As a matter of fact, the mill did cut in the three-day period from the morning of October 15th to the morning of October 18th, 200,000 feet, or an average of 66,600 feet per day. During the next eleven

working days in the month of October, however, it cut on an average only 24,700 feet a day.

Nor is there any reason apparent from the record why the lumber necessary to load the Ostrander could not have been cut in the month of September. From the confidential weekly report made by the Port Angeles mill to the Lumbermen's Association it appears that during the week ending September 22nd the following report was made:

> "Saw mill, box plant, planer and shingle mill all running full capacity—ten hours."

A like statement is made on the report for the weeks ending October 6th and 13th, respectively. (Libelant's 11.)

Furthermore, we think the record shows that a part of this order should have been cut at the Crown Lumber Company's mill at Mukilteo. The charter party provided for the delivery of the cargo at *one* loading place on Puget Sound. On the same day the charter party was executed, Hind, Rolph & Company entered into the contract with the Douglas Fir Exploitation and Export Company. That contract gave the Douglas Fir Company the right to deliver the cargo at *two* loading places on Puget Sound. Having made a contract with the Douglas Fir Company differing in this regard from the contract with Mr. Ostrander, Hind,

Rolph & Company secured Mr. Ostrander's consent to load at two places, namely, at Mukilteo and Port Angeles. Now, Mr. Scott admits that the Crown mill started up on the same day the Port Angeles mill did. He also admitted that its *"efficiency increased a great deal more rapidly than that of the Port Angeles mill."* (229.) The reason he gave for not sending the "Ostrander" to the Crown Lumber Company at Mukilteo was that the Crown Lumber Company's committments were full. (230.) He admitted that the schooner "Crescent," owned by *The Charles Nelson Company,* loaded a cargo of 1,441,000 feet of export lumber at the Mukilteo mill either in October or November. He also admitted that the schooner "Mukilteo" loaded at the Crown mill and the Port Angeles mill in October a cargo of 750,000 feet. This schooner was also owned by The Charles Nelson Co. (213, 214.) It cannot be argued that the Crown Lumber Company was unable to furnish this cargo because it was short of logs, as the testimony of Mr. Scott shows that at the time the strike was called the mill at Mukilteo had about 4,000,000 to 5,000,000 feet of logs on hand. (241.) We think we have demonstrated heretofore in this brief that the failure to supply the cargo at Port Angeles was not due to the insufficient supply of logs.

THE ALLEGED COMMANDEERING OF THE MILL

But little we think need be said concerning this defense—apparently even appellants did not consider it of much importance for no such defense was *pleaded.* Moreover it is not claimed that the mill was actually commandeered before Nov. 16th, but only *practically* commandeered (whatever that may mean.) Even if the mill was practically commandeered, which we deny, it is impossible to tell just when the action was taken. Mr. Scott says that the Government took such action on *September 7th.* (218) On September 15th, however, Mr. Scott told Mr. Ostrander that in all *probability* his plant *would be commandeered.* Irrespective of the question whether any such action was taken by the Government, or when it was taken, nevertheless there is no credible testimony in the record which shows that such action affected the furnishing of the cargo to the schooner. The report which we demanded from the Mill (Libelant's ——) shows that no lumber was cut for Government requirements from September 29th to November 17th. The report does not cover the period from September 7th to September 29th, but there is no reason to believe that the mill was cutting lumber for the Government during that period.

Again, if the Port Angeles mill was commandeered by the Government, such action did not take place until November 16th. We say this because on that date the Mill Company wrote the following letter to the Master of the Ostrander:

> "This is to inform you that our plant has been commandeered by the Government for the cutting of Spruce for airplane stock, and therefore, we are relieved from any and all damages for delay in loading your vessel.
>
> We will try and load your vessel as fast as we possibly can without interfering with the cutting of airplane stock for the Government.
>
> Yours respectfully,
> PUGET SOUND MILLS & TIMBER COMPANY,
> By A. A. Scott,
> Vice Pres. & General Manager."
> (Libelant's 16.)

Assuming the truth of the statement contained in such letter, nevertheless the commandeering of the Mill Company's plant did not greatly affect the ability of the mill to cut the cargo for the Ostrander. On November 17th, the day following the writing of the above quoted letter, the Mill delivered to the Ostrander 119,000 feet of lumber, the greatest amount ever delivered to the vessel at any one time.

In the face of these facts there can be no doubt but that the Court was justified in finding that the commandeering of the mill by the Government did not lessen the output of the mill on general orders or contract. (445)

THE SCHOONER WAS DETAINED 45 DAYS AFTER OCTOBER 14TH

On page 8 of Appellants' Brief it is argued that in any event the Court's award was too great. It is first said that October 15th and December 14th, 1917, should be excluded, and *Merritt v. Ona,* 44 Fed. 369, is cited in support of this statement. But the decision in that case is based upon the *peculiar* language of the lay day clause of the charter party. Except for such a provision no reason can even be suggested for excluding the day loading is completed.

As far as the first day is concerned it will be remembered that in this case notice was given by the Master on October *14th* (see page 4 of this brief). Now notice given on Sunday starts the running of lay days. (*Carroll v. Holway,* 158 Fed. 328, 336). The number of running days, therefore, is sixty-one. The Court allowed fourteen days, excluding Sundays, for loading. The schooner consequently should have been loaded by the evening

of October 30th. There were two Sundays between October 15th and October 30th, so that a total of sixteen days should be subtracted from the whole number of running days. This subtraction the Court made, and allowed forty-five days.

Counsel for appellants argues that *all* the Sundays should be excluded. The basis for this contention is certainly not apparent. The charter party provides for the payment of demurrage *"for each and every day's detention"* of the schooner. "Each and every day" includes Sunday.

> *The Oluf,* 19 Fed. 459;
> Halsbury's Laws of England, Vol. 26, p. 122.
> Carver on Carriage by Sea, Sec. 613;
> *Pedersen v. Eugster,* 14 Fed. 422.

On this point it may be argued that the decree itself excludes Sunday. The phrase "but not including Sundays" found in the decree modifies the preceding phrase "less fourteen loading days." (447). This is not only the correct grammatical construction, but the opinion of Judge Neterer demonstrates that it is also his construction of the decree, as the cases which we have just cited, holding that the phrase "each and every day" includes Sundays, are cited and approved by him in his opinion.

In a desperate attempt to find some method by which the award can be pared down, it is insisted that *Saturday afternoons* should be excluded. The record, of course, is destitute of any showing that Saturday afternoons are holidays in the Puget Sound Lumber District. More than that, even if they were half holidays the cases just cited demonstrate that they should not be excluded. But above and beyond all this the same contention was made in the lower court, and it was there shown that between October 18th, when loading actually commenced, and November 24th there were six Saturday afternoons. The first Saturday was October 20th. The stevedores on that day worked from seven to five (57); on October 27th the stevedores worked all day (58); on November 3rd they worked from one P. M. to three P. M. They did not work longer that day because *the wharf was cleaned up* (61); on November 10th the stevedores worked from seven to noon, at which time *the wharf was cleaned up* (63); on November 17th they worked from 7:30 to 4:30 P. M. (65); on November 24th they worked from 7:30 to two P. M. (67).

FROM NOVEMBER 24TH TO DECEMBER 15TH.

The boat was completely loaded on November 24th, but the bills of lading were not signed or the

freight money paid until December 14th. We think we can best explain the cause of this delay by setting out the facts in chronological order. One of the causes of this delay arose from certain directions given by Charles Nelson Company to the Mill Company *over a month before* the boat was completely loaded. On *October 22nd* the Nelson Company wrote the Mill Company as follows:

> "Please note in connection with order No. 633, D. F. E. & E. Co. for shipment per Motor Schr. 'Levi W. Ostrander,' shipping instructions, etc. attached. You will also find pro forma Bills Lading and specifications for this cargo and under separate cover we are sending you a supply of their blank Bills Lading, *specifications* and *demurrage releases,* which you will please make use of in connection with this shipment.
>
> "You will note from the pro forma Bills Lading that the *freight must be prepaid,* therefore you will please arrive at a definite understanding with the Master of this vessel before she completes loading, in regard to this matter so there will be no unnecessary delay.
>
> "According to the charter party, the freight is payable at S. F., consequently the *prepaid* Bills Lading must be forwarded to us here before payment can be made. If the Captain is not prepared to furnish you with prepaid Bills Lading, the buyers to remit the freight to his owners upon receipt of same. We would suggest you have him draw on Hind, Rolph & Co. at three days' sight draft to come through the Anglo & London Paris Bank of S. F. with original Bills Lading attached, but no time must be lost in so doing.

> "We are quite sure that you fully understand the details necessary for this transaction and would request you to give them your usual prompt attention." (Respondents' A-12.)

It will be noted from the foregoing letter that cargo specifications were sent to the Mill Company to be used when the boat was laden. However, the Mill Company failed, until November 28th. to make up these specifications. (101)

On that date, the Mill Company exhibited to the Captain a copy of the cargo specifications and a copy of the bill of lading. It also demanded at the same time that the Captain sign a demurrage release (101). Upon being so advised Mr. Ostrander wired his Captain to secure a copy of the cargo specifications and of the bill of lading, and also asked to be advised as to manner in which the freight money was to be paid. (Libelant's 6-A.) The Captain replied that he would endeavor to secure copies of the cargo specifications and the bill of lading, and that the freight was payable to him or on a sight draft on the London Paris Bank, San Francisco, to Ostrander's order, with prepaid bills of lading attached. (Libelant's 6-H.)

It will be observed that the bills of lading which it was insisted the Captain should sign were bills of lading showing the payment of freight. The Mill

Company refusing to recede from its position, Mr. Ostrander brought the matter to a head by libeling the cargo on November 30th. Recovery was sought not only for the demurrage which had accrued prior to November 25th and for a period of five days thereafter, but also "for each day's detention from and after this date," i. e., November 30th.

Bond was furnished by Hind, Rolph & Company on December 3rd. (2.) Mr. Hodges, a representative of Hind, Rolph & Company, arrived in Seattle on December 4th. (382.) On December 5th, Mr. Hodges and Mr. Ostrander arrived at the following agreement:

(1) The Master was to sign bills of lading in the form originally prepared by the Douglas Fir Exploitation & Export Company, but containing in addition the following endorsement:

> "This bill of lading is issued and accepted subject to all the terms and conditions set forth in a charter party of May 15, 1917, between H. F. Ostrander, owner, and Hind, Rolph & Company, Charterers." (Libelant's 6-C.)

(2) That the freight was to be paid by demand draft on Hind, Rolph & Company, but same was not to be presented for collection until December 10th. (Libelant's 5-B.)

The Captain was detained in Seattle by illness on December 6th. (103.) He returned to Port Angeles, however, on the 7th and informed the Mill Company that he was ready to sign a bill of lading in the form agreed upon between Mr. Hodges and Mr. Ostrander. (Libelant's 6-D.) Between the 5th and the 7th, however, some demand had apparently been made that a demurrage release be signed, and Mr. Ostrander agreed that the Captain should sign a demurrage release in favor of the Mill Company in the following terms:

> "Security for my claim for demurrage to date of loading having been given by my charterers, I now have no claim against cargo for demurrage." (Libelant's 6-E.)

Request was also apparently made of Mr. Ostrander that the bills of lading be dated December *3rd.* He agreed to comply with this request. He accordingly advised his Captain to give the demurrage release to the Mill Company and to change the date of the bills of lading. (Libelant's 6-E.) He also advised Mr. Hodges that he had given the foregoing instructions to his Captain. (Libelant's 6-K.) Mr. Hodges was then in Aberdeen, Washington. Upon receipt of the foregoing advice from Mr. Ostrander he wired as follows:

> "Telegram just received and satisfactory. However, in view present delay signing will you please telegraph your Frisco bank extending draft until Thursday, which will be much appreciated. Kindly answer." (Libelant's 6-J.)

Reply to this telegram was apparently not promptly received by Mr. Hodges. (Libelant's 5-I.) This, of course, was not the fault of Mr. Ostrander. Mr. Hodges, however, sent on December 9th the following telegram:

> "In view no reply to my telegram of yesterday I am tonight wiring my principals to decline payment of draft. This draft was given on sole understanding that ladings were to be signed last Thursday. You have instructed your captain to sign but stipulated conditions that were not questioned before so delay in documents reaching San Francisco was due to your action and also in violation of our understanding I cannot now consistently agree to payment of draft until ladings actually arrive in San Francisco. I regret this very much but events had made this action necessary. Should you wish to communicate with me my address is Multnomah Hotel." (Libelant's 6-L.)

It will be noted that Mr. Hodges gives as his reason for declining to pay the draft that Mr. Ostrander was not willing to carry out the exact agreement which had been made. The evidence demonstrates that this assertion was wholly untrue. On December 10th, Mr. Ostrander wired Hind, Rolph & Company as follows:

"Hodges wires me from Portland that he has requested you to decline payment of draft he gave me for freight on Ostrander. I insist that draft be paid immediately when presented and unless you agree to this I will instruct Master further not to sign ladings until freight money is in my hands. I am thoroughly tired of the methods you are employing in this transaction." (Libelant's 5-C.)

On the same day he received the following reply:

"We will pay the freight money Levi W. Ostrander the moment we receive from you proper bill of lading also letter certifying that you have now no claim against cargo for demurrage. Will hold you responsible for loss of time and all consequence damages resorting from your actions." (Libelant's 5-D.)

In reply to the preceding telegram Mr. Ostrander sent the following:

"Yours of date as bill lading as presented for signature carries on its face receipt for the freight I do not see how you can expect delivery of bills lading until you have paid freight STOP On bank's advice of payment of freight draft bills of lading and letter covering claim for demurrage all as per form approved by your Mr. Hodges will be at once delivered by Master to Mill Company at Port Angeles." (Libelant's 5-E.)

On the 11th, Hind, Rolph & Company wired as follows:

"Your wire tenth. You misunderstand our position. *We do not expect bill ladings* before

> payment freight. *Payment freight* and *deliver bill ladings concurrent acts* to be done simultaneously deposit bill ladings and letter in form approved by Hodges in Port Angeles bank in escrow to be delivered Hodges on such bank receiving telegraphic advice from San Francisco bank that freight money has been received to your account here ship as per charter party clauses G. Hodges arrives Port Angeles tomorrow to attend details." (Libelant's 5-F.)

On December 13th, Mr. Hodges, who was then in Portland, sent the following telegram to Mr. Ostrander:

> "Please have Captain sign ladings and letter that we agreed upon and deposit them with the Port Angeles Trust Savings Bank with instructions to mail them to me by special delivery at Multnomah Hotel as soon as they receive telegraphic advice that the freight money has been deposited in your name at San Francisco. I am asking bank to telegraph when documents are in their hands and I will then arrange deposit in San Francisco." (Libelant's 6-M.)

On the 14th, Mr. Ostrander himself went to Port Angeles. When he arrived there, however, (383) the Mill Company refused to carry out the agreement which had been made (382-383), even though that agreement embraced the giving of a letter by the Captain to the Mill Company that no claim for demurrage was being made against the Mill Company. Mr. Ostrander thereupon wired Hind, Rolph & Company as follows:

> "On Hodges' assurance that mill was ready to carry out his arrangements with me I came here to have bill ladings placed in escrow with understanding you would pay freight today. Mill declines to proceed pending specific instructions from Chas. Nelson. Please see they instruct Scott immediately. Want to leave here at one today." (Libelant's 5-H.)

Hind, Rolph & Company thereupon communicated with Charles Nelson Company and then sent the following telegram:

> "Charles Nelson Company telegraphing mill act under instructions from Hodges." (Libelant's 5-G.)

Charles Nelson Company apparently wired the Mill Company and it finally agreed to carry out the agreement made between Mr. Ostrander and Mr. Hodges, but even then protested against changing the date on the bills of lading from November 27th to December 3rd. (Libelant's 6-G.)

Now, we think no one can read this record without being convinced that the delay after the loading down to December 14th was not in any respect due to any fault of Mr. Ostrander. The fault was primarily that of the Mill Company, the agents of Hind, Rolph & Company. In truth, the record demonstrates that Hind, Rolph & Company themselves recognized that such was the fact. Mr. Hodges of Hind, Rolph & Company on December

20th, wrote a letter to Mr. Ostrander, in which, among other things, he said:

> "We *admit* that in some instances the loading mill may have taken what seemed to be *undue* precautions which have *hindered the prompt dispatch of the vessel,* but if you will consider the *sole* actions of this firm, think that you can but agree that everything possible was done to expedite the sailing of the vessel. There was probably one or two days' unfortunate delay which was due to a misunderstanding of one important telegram which the writer should have received on Monday afternoon, December 10th, but was not received until Wednesday, the 12th. This may or may not have had any effect on the final settlement, but it is certainly the only event whereby we could have been held responsible for any seeming neglect." (Libelant's 5-I.)

Mr. Ostrander in reply said this:

> "Your letter of the 20th to hand this morning. I dislike very much to further discourse an unpleasant transaction, but your action in stopping payment of the draft given me for freight money—notwithstanding that the Captain was at all times ready after his return to Port Angeles on the 7th inst. (he having been delayed here one day) to sign ladings on the basis of Mr. Hodges' agreement with me, *and in the same terms which he ultimately signed,* certainly did not reassure me of your good intentions.
>
> "Further—there has been from the first so apparent an attempt on your part to *blame others* with whom I am in no way concerned for your short-comings that I believe on due

> reflection you will admit that I had very good reasons for expressing myself as I did and that I certainly have no reason to feel differently now." (Libelant's 5-J.)

In their reply to Mr. Ostrander's letter Hind, Rolph & Company did not claim that Mr. Ostrander was in any respect at fault. They accounted for a portion of the delay by reason of the fact that Mr. Hodges, who was most familiar with the transaction, was away from San Francisco at the time, and that in his absence Hind, Rolph & Company saw nothing else to do but to stop payment on the draft. (Libelant's 5-K.)

CARGO SPECIFICATIONS.

Irrespective of all other considerations, the delay between November 24th and November 28th was due to the failure of the Mill Company to furnish specifications of the cargo. It is said, however, (Appellants' Brief, p. 45) that the vessel could have sailed away without the cargo specifications being delivered to her, and that consequently this was not a cause of the vessel's detention. This statement, however, is manifestly erroneous. In order for the vessel to sail she must clear at the Customs House, and before the vessel can clear she must furnish to the Customs House a manifest of her

cargo. The manifest must contain a description of the cargo. It must show the number of pieces on board. (R. S., §§4197-4198.) This information the Captain does not have. It must be supplied to him by the shipper.

In accordance with the provision of the statute above cited the Treasury Department has made the following regulation, which was in force and effect in November, 1917:

> "Vessels bound to foreign countries or to or from noncontiguous territory of the United States should not accept shipments unless extracts in the form hereinbefore provided, certified by the Collector of Customs, or declarations and extracts therefor have been received.
>
> "The customhouse number on the certified extract *must be noted on the vessel's manifest* opposite each consignment, and such extracts attached to and delivered with such manifests to the Collector for clearance.
>
> "Clearance will not be granted to any vessel until a complete manifest accompanied by certified extracts, or declarations and uncertified extracts, for all cargo on board has been filed with the Collector as required by Sections 4197 to 4200, Revised Statutes, except under the following conditions."
>
> Treasury Decisions No. 35969, Vol. 29, page 655.

BILLS OF LADING AND PREPAID FREIGHT.

It is next argued that the insistence of Hind, Rolph & Company and the Mill Company that straight bills of lading should be issued by the Captain was not a cause of the delay. It is claimed that the charter party did not require prepayment of freight, and that consequently the Captain could have issued any form of bill of lading he desired, and then sailed away. It is true that the charter party does not in express terms require the prepayment of freight, but nevertheless we think that it does in effect so require. Moreover, the understanding of all the parties to the transaction convincingly proves that prepayment of freight was required.

In the letter of October 22nd, Charles Nelson Company advises the Mill Company that the bills of lading require that the freight *must be prepaid* (Respondents' A-12) and the bills of lading sent forward to the Mill Company contained such a provision.

Again, the record shows that no one of the parties to the transaction ever claimed that freight was not to be prepaid. Moreover, the record shows that under this form of charter party it was *customary*

that the freight should be prepaid. We call the Court's attention to the following cross-examination of Mr. Ostrander by counsel for appellants:

"Q. Do you remember under the charter-party what the provision was for the payment of the freight?

A. I do not recall now.

Q. Is it not a fact that the freight was to be paid at San Francisco, under the charter-party?

A. That draft was payable at San Francisco.

Q. How is that?

A. That draft was also payable at San Francisco.

Q. You expected you would have to go down to San Francisco to collect that freight, didn't you?

A. Oh, no.

Q. You did not? A. No.

Q. What was your idea?

A. My idea was that the bills of lading would be handed over against the payment of the freight, *as is customary,* in San Francisco, according to the charter-party.

Q. Did you understand at the time that you were not entitled to any freight until you handed over the bills of lading? A. Oh, yes.

Q. You knew that? A. Yes.

Q. You knew that you were obliged—

A. —to deliver the bills of lading to get my freight." (142.)

Furthermore, Hind, Rolph & Company, as late as December 11th, wired Mr. Ostrander as follows:

> "Your wire 10th. You misunderstand our position. *We do not expect* bill ladings before payment freight. Payment freight and deliver bill ladings concurrent acts to be done simultaneously. Deposit bill ladings and letter in form approved by Hodges in Port Angeles bank in escrow to be delivered Hodges on such bank receiving telegraph advice from San Francisco that freight money has been received to your account here ship as per charter party clauses G. * * *." (Libelant's 5-F.)

Appellants seek to meet the foregoing argument by asserting that it was the statutory duty of the Master to issue a bill of lading; that he could have issued and tendered a bill of lading in any form he desired and then sailed away. It is true that it is the duty of the Master to issue a *true* bill of lading, but the bill of lading must describe some one as the shipper, and we presume be delivered to some person. It must also give the port of discharge. To whom, we may ask, were we to issue this bill of lading? What port were we to name as the port of discharge? The charter party gives the charterer the right to name any one of five ports. Which one of these ports was the Captain to select? More than this, the right to prepayment of freight is to the shipowner, under the precise form of charter party used in the case at bar, a most valuable right. The charter party provides:

"U. Freight to be paid as per Clause G, and after payment to be considered *earned,* vessel *lost* or not lost, at any stage of the voyage."

Now, when did the assertion of a legal and valuable right become a fault? Or will it be argued that because one does not surrender or waive a valuable right that, therefore, a wrongdoer is to be relieved from the consequences of his own wrongful act?

The case of *Hansen v. American Trading Co.,* 208 Fed. 884, is not in point. It was admitted in that case that the Master had no right for one of the reasons, at least, assigned by him to refuse to sign the bill of lading presented to him. But the Master in this case was not in the wrong in part or at all. He had a right to refuse to issue any bill of lading until the freight money was paid to him. He was not compelled to look either to his lien on the cargo or to marine insurance.

WAR TRADE BOARD

It is next argued that the principal cause of the detention of the vessel at Port Angeles was the act of the War Trade Board. It is true that prior to December 14th the War Trade Board had refused to permit the schooner to depart for South Africa,

but we fail to see how this relieves the appellants from liability for demurrage until the freight money was paid.

We admit that if a charterer agrees to give a vessel dispatch and fails to do, and then by reason of such failure the vessel is detained still further by ice, blockade, embargo, or other hindrance, and the vessel but for such failure would have been able to sail before prevented by ice, blockade, embargo or other hindrance, she nevertheless can recover demurrage for only such time as she was detained by *fault* of the charterers. This we think is the clear import of the decisions in *Randall v. Sprague,* 77 Fed. 247, and *Dewar v. Mowinckel,* 179 Fed. 355, 361.

> "The charterer is not liable for a detention which occurs *without any fault* on his part after the loading has once been completed."
>
> Carver on Carriage by Sea, 6th Ed. Sec. 630.

This statement no doubt means that the charterer is liable for all delay until the time when he ceases to be *at fault.* He is not liable for any delay thereafter. The period then for which demurrage will be awarded is the period during which the charterer is at fault. When the fault ceases liability ceases, even though as a consequence of the fault the ship may be detained longer. But the charterers in this case were *at fault until December 14th.*

A CREW WAS SECURED IN PROPER TIME

It is argued that the charterers are excused from any delay between November 24th and December 14th by reason of the failure on the part of the Master to secure a crew. The Master on December 4th, after saying that he had not as yet *signed on* a crew, continued:

> "Q. Do you know when you will get away then, Captain?
>
> A. *I have the men ready to go with me as soon as we get through with his here.*
>
> Q. You have gotten a crew?
>
> A. I have gotten them already to sign on.
>
> Q. When did you get your crew?
>
> A. We got them up here.
>
> Q. I say when?
>
> A. I got them within the last day or two." (82.)

Now, there was no necessity that the Captain should secure a crew at any earlier date. The schooner was not ready to sail and Mr. Ostrander testified without contradiction that it is not the custom to obtain a crew and ship them on board before the vessel is ready to sail. (385.)

SEIZURE OF THE CARGO DID NOT DETAIN THE VESSEL

It is said that our act in seizing the cargo was the real cause of the detention of the vessel from November 24th to December 14th. Let us see. In the first place the cargo was seized on November 30th and released on December 3rd. Obviously, detention *after* December 3rd and *before* November 30th was not due to our act. But the seizure of the cargo did not detain the vessel at all. Hind, Rolph & Company at all times down to December 5th were demanding *clear* bills of lading. They also wanted a demurrage release. Mr. Ostrander had a claim for demurrage "which he had a right to demand should be settled at the place of loading." (*The India,* 49 Fed. 83.) He was willing, however, to issue or accept a bill of lading which would protect his claim. Hind, Rolph & Company also wanted *prepaid* bills of lading. True, they were willing to pay freight money, but only upon the condition originally that *clear* bills of lading were issued.

Mr. Hodges and Mr. Ostrander finally arrived at an agreement concerning this matter, but Hind, Rolph & Company repudiated the agreement and stopped payment on their draft. Mr. Hodges gave as his reason for stopping payment the delay in

delivery of a telegram. Hind, Rolph & Company gave as their reason the absence of Mr. Hodges from San Francisco, and their inability, in his absence, to determine what they should do. Moreover, Mr. Hodges agreed to a demurrage release in one form—the Mill Company demanded another form. Hind, Rolph & Company requested that the bills of lading be dated December 3rd. Mr. Ostrander acquiesced in their request, but the Mill Company *protested* against that date being inserted in the document. Now, what was the real cause of the detention of the vessel? Originally it was the insistence by Hind, Rolph & Company and the Mill Company, their agents, upon conditions which they had no right to exact. In the second place it was the repudiation by Hind, Rolph & Company of the agreement which they had made. In the third place it was due to the action of the Mill Company in refusing to carry out the second agreement made between Hind, Rolph & Company and Mr. Ostrander.

It may be that under the decision in the case of *Elvers v. W. R. Grace & Company,* 244 Fed. 705, Mr. Ostrander did not have a lien on the cargo for demurrage at the port of loading, but in this connection it is to be observed that while the *Elvers Case* was decided prior to November, 1917, yet the deci-

sion had not at that time been rendered available to the profession. Moreover, if there be any legal proposition in maritime law involved in obscurity, it certainly is a proper construction of the cesser clause. The cases have hitherto been in hopeless and irreconcilable conflict. Mr. Scrutton points out that Lord Bramwell has piquantly described this class of cases as "cases where no principle of law is involved but only the meaning of careless and slovenly documents." (Scrutton on Charter Parties, 9th Ed. Art. 54.)

We think it perfectly clear, therefore, that Mr. Ostrander acted as any reasonable man would have acted under the circumstances, and that the seizure of the cargo constituted no fault on his part.

THE PERIOD FROM NOVEMBER 30TH TO DECEMBER 14TH

It is asserted by appellants that no demurrage can be recovered for the period between November 30th and December 14th, for two reasons: First, because counsel for appellee waived any claim for demurrage for this period in open court, and second, that no demand for demurrage for this period was made in the libel, nor was the libel amended to ask for demurrage for this period.

With reference to the last contention, the record shows that the libel was filed on November 30th. Five days demurrage had already accrued. Demand was made for demurrage for this five-day period, *and* also for demurrage in the sum of $250.00 per day for each and every day's detention from and after November 30th. (8.) On what theory, therefore, it can be said that the libel contained no claim for demurrage from November 30th to December 14th we are at an utter loss to understand.

The contention that we waived demurrage for any period after November 30th is equally unfounded. This we think we can abundantly demonstrate. At the time of the trial Mr. Ostrander was the first witness called. He was asked a few questions concerning his occupation, the ownership of the schooner, when he acquired her, whether the vessel was ready to receive her cargo on August 25th, what he observed when he was at Port Angeles in October relative to the method in which lumber was furnished to the vessel, and then his attention was directed to the events which occurred after the loading of the vessel was completed. He stated that he entered into a certain agreement, hereinbefore set out, with Mr. Hodges. As Mr. Hodges did not arrive in Seattle until December 4th (382) it is obvious that Mr. Ostrander was testifying as

to events which occurred subsequent to November 30th. The details of the arrangement between Mr. Hodges and himself were then given. (101, 103.)

Mr. Ostrander next stated a conversation which he had with Mr. Scott of the Port Angeles mill on December 14th. Thereupon there was introduced in evidence all the correspondence relative to this period. The great bulk of the letters and telegrams so introduced were written and sent between December *5th* and December *14th* (105, 106). Nearly all these letters and telegrams were introduced as one exhibit, and counsel for appellee accompanied their introduction with this statement:

> "I will say for your information that all these letters and telegrams in this exhibit relate to the controversy which arose as to what should be endorsed upon these bills of lading and the subsequent controversy which grew out of it relative to the stopping of the payment upon the draft which was given to Mr. Ostrander." (106.)

The statement just quoted was then followed by the following statement from counsel for appellants:

> "Mr. Hengstler—If your Honor please, it is admitted by us that all these communications are authentic, but I wish to reserve my exception to the materiality and relevancy of this testimony and any testimony which pertains to the period of November 24th, reserving the point that I will be able to satisfy your Honor *that as a matter of law, no demurrage could*

arise. Now, may that objection apply to anything else that is offered after *November 24th?"* (107.)

Immediately after the making of the foregoing statements there was offered on behalf of appellee some additional letters and telegrams, all of which were written and sent between November 28th and December 14th, and all of which related to appellee's claim for demurrage for the period running to December 14th. (108, 109.)

Upon the conclusion of the direct examination of Mr. Ostrander and before the remark which is relied upon by appellants as a waiver (146) was made by counsel for appellee, counsel for appellants cross-examined Mr. Ostrander. This cross-examination was directed in part to what happened after Mr. Hodges came to Seattle in December. (Record, pp. 141, 142, 143.) Upon the conclusion of this cross-examination counsel for appellee, in order to show that the delay between December 14th and December *26th* was not due to any default of Mr. Ostrander, but was due solely to the act of the War Trade Board, stated that he would offer in evidence certain letters and telegrams which would show that such was the fact. (145.) While it is true that the five-day period was mentioned, yet the purpose of making the statement was also set forth as follows:

> "We are making no claim for the subsequent time during which the Government would not allow us to proceed." (146.)

It is thus clearly apparent that counsel for appellants was not misled, and that he was not prevented from cross-examining as to this period, but that he did in fact cross-examine as to the facts concerning the period between November 30th and December 14th. It will not be denied that Mr. Ostrander was available for cross-examination at all times, nor will it be questioned that the precise contention made here was made in the lower court and urged with vigor. The trial court was in a position to know whether or not the inadvertent allusion to the five-day period had misled counsel for appellants or prevented him from bringing out any fact which he might desire to bring out concerning this particular period.

The trial court, however, allowed us demurrage from November 24th to December 14th, and we submit that in so doing he was clearly in the right.

Respectfully submitted,

CHADWICK, MCMICKEN, RAMSEY & RUPP,
Proctors for Appellee and Cross-Appellant.

No. 3426

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN ADMIRALTY

HIND, ROLPH & COMPANY, a Copartnership, and 1,727,783 Feet of Lumber Loaded on Board the Schooner "Levi W. Ostrander," and Fidelity Deposit Company of Maryland, a Corporation,

Appellants and Cross-Appellees,

vs.

H. F. OSTRANDER,

Appellee and Cross-Appellant.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division.

ANSWERING BRIEF OF H. F. OSTRANDER, APPELLEE AND CROSS-APPELLANT

CHADWICK, McMICKEN, RAMSEY & RUPP,
Proctors for Appellee and Cross-Appellant.

660 Colman Building,
Seattle, Washington.

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No. 3426

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN ADMIRALTY

HIND, ROLPH & COMPANY, a Copartnership, and 1,727,783 Feet of Lumber Loaded on Board the Schooner "Levi W. Ostrander," and Fidelity Deposit Company of Maryland, a Corporation,

Appellants and Cross-Appellees,

vs.

H. F. OSTRANDER,

Appellee and Cross-Appellant.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division.

OPENING BRIEF FOR H. F. OSTRANDER, APPELLEE AND CROSS-APPELLANT

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OPENING BRIEF FOR H. F. OSTRANDER, APPELLEE AND CROSS-APPELLANT

STATEMENT OF THE CASE

There are two appeals in this case. The question involved in this particular appeal is whether the

Trial Judge was correct in denying Mr. Ostrander's claim for demurrage for the period from August 25th to October 13th, 1917. The Trial Judge found that:

> "The notice of August 13th that the vessel would be ready August 25th is not sufficient to give the vessel a status of 'arrived ship.'" (444.)*

It is not entirely clear to us just what the Court meant. It may be that he meant that a certain notice given on August 13th was not sufficient notice of the boat's readiness to load. In view of the fact that this was one of the contentions made at the time of trial, we are of the opinion that this is what the Court meant by its rather ambiguous statement. It may be, however, that the Court meant that irrespective of the sufficiency or insufficiency of the notice, nevertheless the schooner was not an "arrived ship" until she arrived at Port Angeles. We shall, therefore, discuss the question in this brief in both aspects.

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* (Throughout this brief, numbers in parenthesis refer to pages of Apostles.)

WHAT ARE THE FACTS?

On May 15th, 1917, H. F. Ostrander, then acting as agent for the owners of a sailing vessel then building in the Seaborn Yards, at Tacoma, Washington, and Hind, Rolph & Company of San Francisco entered into a contract of charter party. The form of charter-party was prepared and printed by Hind, Rolph & Company. The provisions of the charter-party material to this particular appeal are as follows:

> "This charter-party, made and concluded upon in the city of San Francisco, Cal., this 15th day of May, 1917, between H. F. Ostrander, Agents for Owners of the Sailing Vessel known as No. 4 of the burthen of.....tons or thereabouts, register measurement, now building at Seaborn Yards, Tacoma, Washington. (Lumber capacity about 1,750 M. ft. B. M.) Wherefrom vessel shall proceed direct in ballast to a loading place on Puget Sound, *to be designated by Charterers prior to June 30th, 1917,* under this Charter, of the first part, and Hind, Rolph & Company of San Francisco, of the second part: WITNESSETH: That said party of the first part agrees on the freighting and chartering of the whole of said vessel, * * *. (Civil commotions, floods, fires, strikes, lockouts, accidents on railways and/or docks and/or wharves, or any other hindrances beyond the control of either party to this agreement or their agents always mutually excepted) unto said party of the second part, for a voyage from a usual safe loading place on Puget Sound (Washington) as *ordered* by charterers or their agents to one port in South Africa. * * *

"For each and every day's detention by default of said party of the second part, or their agents, Two Hundred and Fifty Dollars ($250.00) per day shall be paid day by day, by said party of the second part, or their agents, to said party of the first part, or agent. * * *

"s. Should vessel not have arrived at port of loading (as above), on or before 12 o'clock, noon, of the 31st day of August, 1917, Charterers to have the option of cancelling or maintaining this charter, on arrival of vessel. Lay days not to commence before 1st day of July, 1917, unless at Charterers' option."

At this point we may say that all the testimony relative to the questions involved in this particular appeal is contained in the form of letters and telegrams passing between the respective parties.

The original exhibits in this case have not been printed in the Apostles on Appeals, but by stipulation were sent to the Clerk of this Court. A majority of the letters and telegrams, however, are contained in the answers made by Mr. Ostrander to the first, second and third interrogatories attached to the answer, and will be found on pages 30 to 44, of the Apostles on Appeals. We shall, however, in this brief throughout refer to such letters and telegrams by the Exhibit numbers given them by the Clerk of Court at the time of trial.

The first material letter is that of May 26th, in which Hind, Rolph & Company say:

"In order to arrange for *the despatch,* in accordance with the charter, at the loading port, we have had to agree that the vessel would load at *two* mills. The two mills, of course, will be in the same district, so that the shift can be made within a very short time. In view of this circumstance, we hope that in due time you will be able to permit loading at a second mill." (Libelant's 1-B.)

On June 20th, 1917, Hind, Rolph & Company again wrote Mr. Ostrander. They said:

"In regard to the July-August sailer which we chartered from you for South Africa, will you kindly give us an idea, as far as it is possible for you to do so at the present time, of what her carrying capacity will be, also how much she is expected to carry on deck? We should also like to know the name of the vessel as soon as she has been named *and also whether there has been any change in her anticipated date of loading."* (Libelant's 1-C.)

On June 28th, 1917, Mr. Ostrander replied:

"The vessel chartered you for July-August loading will be named the 'LEVI W. OSTRANDER.' She is expected to be launched between the 10th and 20th of July. * * *

"You wrote some time ago asking for the privileged of two loading ports, and while I should very much prefer to load at one I will, of course, in case of absolute necessity, agree to a second. * * *" (Libelant's 1-D.)

On July 2nd, Hind, Rolph & Company wrote Mr. Ostrander:

> "* * * In regard to the loading, would say that it has been necessary for us to receive this cargo at two ports so that with your permission we will load her at the Crown Lumber Company, Mukilteo, and the Puget Sound Mills and Timber Company, Port Angeles. * * *
> "We will now thank you to let us know as early as possible just when you expect the vessel will be ready to load." (Libelant's 1-E.)

On August 13th, 1917, Mr. Ostrander sent the following telegram:

> "Schooner Levi W. Ostrander will be ready for cargo by August twenty-fifth. Will you notify mills to have cargo ready and are you now prepared to name port of discharge?" (Libelant's 1-F.)

On the following day Hind, Rolph & Company acknowledged receipt of the telegram of August 13th and after quoting it continued as follows:

> (We) "beg to advise that we are *notifying the mills that the Schr. 'Levi. W. Ostrander' will be ready to load by August 25th.*
>
> "Owing to the strike situation, we do not know at present just how far the mills have gotten along with this cargo but we have asked to be definitely advised and will let you know as soon as possible all particulars. * * *" (Libelant's 1-G.)

Two days later Hind, Rolph & Company again wrote Mr. Ostrander as follows:

"With further reference to our respects of the 14th inst. regarding the loading of this vessel, we are just in receipt of the following letter from the Douglas Fir Exploitation & Export Co., from whom we have purchased the cargo:

" 'Acknowledging your favor of the 14th, this cargo has been placed by us with The Charles Nelson Co., who in turn placed it with the Port Angeles Mill, but now that the strike has come on since this has been done, it is just possible that when the labor troubles are over and the mills are again able to operate, they may want to cut part of it at Mukilteo and part at Port Angeles, which will be their privilege to do. If, however, the vessel insists on going to the mill, she may go to Port Angeles, but her laydays cannot commence to count until the mill is able to take care of her, this, on account of the general strike. *We, however, accept your notice of the 14th as evidence that the vessel is ready to load during August.*'

"We are sorry that owing to the strike situation, there is a possibility of the vessel being delayed but hope that the mills will be able to load the vessel when she is ready." (Libelant's 1-H.)

On August 20th, Mr. Ostrander wired Hind, Rolph Company as follows:

"Your letter sixteenth in view of position taken by Douglas Fir Company it seems clear we cannot expect to secure cargo for Levi W. Ostrander for several weeks. I think therefore you should either arrange for lumber from mills now running or agree to cancellation of charter on terms fair to us both. Kindly wire promptly your ideas latter suggestion." (Libelant's 1-J.)

Hind, Rolph & Company immediately replied as follows:

> "Regret our inability reply definitely now but have submitted situation to buyers asking their best proposal if in position to cancel." (Libelant's 1-K.)

On the same day they followed this telegram with a letter confirming the telegram sent out August 20th, and saying:

> "* * * The situation is very annoying, which we deeply regret and if there is anything that we can do ourselves to help matters along, we will be only too pleased to do so. We hardly think, however, that the buyers will agree to any cancellation because since the cargo was sold, *prices have somewhat advanced* and the purchase will no doubt turn out very satisfactorily from their standpoint." (Libelant's 1-I.)

On August 25th, Hind, Rolph & Company advised Mr. Ostrander that their African buyers would not consider cancellation of the charter under any circumstances. (Libelant's 1-L.)

No other correspondence passed between the parties until September 14th, 1917, when Mr. Ostrander sent the following telegram to Hind, Rolph & Company:

"Schooner Levi W. Ostrander having been *ready for cargo since August twenty-fifth,* I am disappointed in that you are apparently quite content to await the pleasure of the Charles Nelson Co., who I understand are diverting their own vessels to other mills. Other manufacturers are making attempts to fill commitments and getting results. Naturally I cannot permit matter to drag in this manner and unless you are now able to promise delivery of cargo definitely and within a reasonable specified time, would request you to forward immediately copy of your purchase contract. Will then decide on course to follow and advise you." (Libelant's 1-M.)

Hind, Rolph & Company then replied as follows:

"Your dayletter today. It is difficult for us to assist matters to any great extent from this end but suggest you communicate with Mr. A. A. Scott manager of Charles Nelson mill either at Mukilteo or Port Angeles regarding the loading. We are pressing mill constantly but they are protected by strike clause in lumber contract of which we are mailing you copies today as per your request. Believe best results are obtainable by your communicating with Mr. Scott personally." (Libelant's 1-N.)

It will be noted that Hind, Rolph & Company had, as early as August 16th, 1917, taken the position that the exception clause in the charter-party released them from any liability for demurrage as long as a strike existed at the logging camps or the mills. They apparently assumed, throughout the entire controversy, that because the Douglas Fir

Exploitation and Export Company was free from any liability to them by reason of a provision in the sale contract between the Douglas Fir Expolitation and Export Company and Hind, Rolph & Company, or the sale contract between the Douglas Fir Exploitation and Export Company and the Charles Nelson Company, that they were free from any liability to Mr. Ostrander.

Without further comment we again turn to the correspondence. On the same day on which the last preceding telegram was sent, Hind, Rolph & Company sent to Mr. Ostrander a copy of their contract with the Douglas Fir Exploitation & Export Company and of the contract with the Charles Nelson Company. (Copies of these contracts were introduced in evidence at the time of trial and are designated as Libelant's 1-Q and 1-R.)

Continuing, Hind, Rolph & Company say:

> "The question of getting the 'Ostrander' loaded at the earliest possible moment is by no means being neglected by us but inasmuch as we are *legally powerless,* it is difficult to make any appreciable headway without the strike situation improving decidedly." (Libelant's 1-P.)

As requested by Hind, Rolph & Company, Mr. Ostrander communicated with Mr. Scott of Charles Nelson Company and as a result of his communica-

tion wired Hind, Rolph & Company on September 15th as follows:

> "Night letter received. Have talked with Scott who has nothing encouraging to say but *intimates* that in all *probability* his plant is *about* to be *commandeered* by the Government in which case of course I shall consider your charter cancelled." (Libelant's 1-O.)

To this message Hind, Rolph & Company replied on September 17th as follows:

> "Have conferred with Douglas Fir Company. Are informed that your vessel will be loaded as quickly as conditions make it possible. They know nothing of mills being commandeered by Government but think this would only apply to mills able to cut Government spruce. Will do everything possible expedite matters but must protest against and will not consent cancellation this charter." (Libelant's 1-S.)

Immediately upon receipt of the foregoing telegram, Mr. Ostrander wired as follows:

> "Referring our charter May fifteenth of vessel now named Levi W. Ostrander and of *our notice* to you that *vessel* would be *ready commence loading August twenty-fifth in accordance with charter* and to the fact that you have so far failed to notify us of your ability to furnish cargo you are now hereby notified that I will claim demurrage at rate mentioned in charter from and after August twenty-fifth and until such time as you commence furnishing cargo in accordance with charter also that unless demurrage fully paid any bills of lading issued will have full claim for demurrage indorsed thereon." (Libelant's 1-T.)

On September 20th, Hind, Rolph & Company sent a telegram to Mr. Ostrander, the material portion of which is as follows:

> "Your nightletter of nineteenth regarding charter of Levi W. Ostrander received and our recommendation is that you confer with Mr. Scott placing your vessel in his hands and *waiving your alleged claim for demurrage.* We are sure he will assist you all possible in view of the clause in the charter party with reference to strikes and the existing condition throughout the lumber district we cannot admit of any demurrage due and will not permit any endorsement of demurrage to be made on bills of lading." (Libelant's 1-U and V.)

On the same day Hind, Rolph & Company wrote a letter to Mr. Ostrander, the material portion of which is as follows:

> "The charter party provides that in the case of strikes, both owner and charterer are mutually relieved of their responsibilities pending a settlement. As you know, there is now and has been for some time past a serious strike in the lumber mills and camps throughout the Puget Sound district. *While it is admitted that some of the mills are now endeavoring to operate,* nevertheless it cannot be said that the strike has been settled. None of the mills are operating at anywhere near their capacity and while this condition lasts there is very little that can be done to assist the loading of your vessel or any other. We have done our utmost here with both the Charles Nelson Co., from whom we have bought this cargo, and also with the Douglas Fir Company through whom the cargo was originally purchased. They have

assured us from time to time that they will do everything in their power to give this vessel rapid despatch.

"In reply to your wire today regarding your alleged claim for demurrage, this we cannot admit, nor can we allow any demurrage to be endorsed on the Bills of Lading because there is no demurrage due and cannot be any under the present conditions. We have suggested that you communicate again with Mr. Scott, place your vessel entirely in his hands, *waiving your claim for detention* and alleged demurrage and let them do the best that they can. We think that this is the only satisfactory method to follow out under the curcumstances. We have also advised you in our message that we are doing this same thing on the vessels which we own and which are ready to load but cannot secure their cargoes on account of the strike." (Libelant's 1-W.)

On September 22nd, 1917, Mr. Ostrander wired Hind, Rolph & Company as follows:

"Absence from city delayed my answering your day letter twentieth re charter Levi W. Ostrander I consider vessel now on demurrage as per my wire to you nineteenth which I reaffirm STOP *Will move vessel to any port on Puget Sound only on receiving orders so to do from you* STOP I have no relations with parties who are to furnish you cargo and if they have protected themselves by strike clause that question is between you and them STOP It is your duty to furnish the vessel cargo and strike clause in charter has no reference to a dispute between mill owners and their employees STOP My counsel advise me that strike clause in charter relates only to matters

affecting completion of vessel loading by stevedores getting crew and similar matters and that lumberman's dispute is too remote a cause to bind me under charter or relieve you from demurrage STOP You certainly cannot expect hold vessel indefinitely without paying demurrage because there is labor trouble at a particular mill which you have selected to cut a particular order STOP Inasmuch as my suggestion cancellation charter as way out of difficulty was declined by you I trust you will now give *definite order to proceed to loading port.*" (Libelant's 1-X.)

To the last mentioned telegram, Hind, Rolph & Company sent the following reply:

"Your dayletter Saturday received today and in reply we can only reiterate what we have previously told you STOP We have also previously given you loading orders and the vessel may proceed to the mill when ready and if you care to act on our previous suggestion mill will take one vessel and do best possible but if you don't do this then mill will stand on their legal rights STOP Think your reference to strike clause is in error as it does not mention anything specifically as to stevedores, crews, etc., but it does specifically provide that hindrances beyond the control of either parties are mutually excepted. We regret condition of affairs very much but we were not instrumental in any way and until strike is settled and conditions are again normal we are powerless to do anything." (Libelant's 1-Y-Z.)

On September 25th, Hind, Rolph & Company wrote a letter to Mr. Ostrander, the material portion of which is as follows:

> "We are sorry we cannot agree with your counsel's advice in regard to the strike clause affecting this charter. There are at least a dozen vessels on Puget Sound at the present moment which are in a similar position to the 'Levi W. Ostrander,' and to our positive knowledge they are all being treated the same way. Even though the particular reference to the strike clause in the Charter Party was not binding as between the mill and the vessel, *the further clause in regard to hindrances of any kind would certainly prove applicable in this case.*" (Libelant's 1-A[1].)

On October 1st, Mr. Ostrander telegraphed Hind, Rolph & Company as follows:

> "In re Ostrander charter my counsel Hughes, McMicken, Ramsey and Rupp suggest that you call your own counsel's attention to sections two hundred fifty-two to two hundred fifty-seven B and cases cited fifth edition Carvers Carriage by Sea. They advise me that neither the strike clause nor any other hindrances clause under the facts relating to lumbermen's dispute with their employees and the general conditions that have obtained on Puget Sound relieve you from liability for demurrage since August twenty-fifth." (Libelant's 1-B[1].)

To this telegram Hind, Rolph & Company made reply by letter on October 4th, the material parts of which are as follows:

> "Referring to your night lettergram of October 1st, 1917, we have acted upon your suggestion and have called our Counsel's attention to your contentions, and the authorities cited by your counsel, and are now in a position to

say that we are advised that you *have no legal right to demurrage under the Charter Party of May 15th, 1917,* and under the present circumstances. * * *

"We shall furnish the cargo to the vessel at the wharves of the *Crown Lumber Co.* at Mukilteo and the *Puget Sound Mills & Timber Co., Port Angeles,* as soon as the conditions resulting from the strike permit. Just when that will be possible is a matter beyond our control to determine definitely at this moment; but we assure you that we are anxious to be in a position to furnish this cargo with the least possible delay.

"As soon as conditions at the wharves named have become such that the cargo can be delivered to the vessel as fast as she can receive it, we will notify you of that fact so that you may then proceed to the first loading place at Mukilteo, in case you desire to keep the vessel at Seaborn Yard, Tacoma, until then.

"We would suggest again, however, that the vessel would save time if, instead of waiting at Seaborn Yard after being ready to load, she proceeded to the loading wharf at Mukilteo and there accepted the cargo as fast as the Mill will deliver it. We are assured by the Mill that it will use its best efforts to give you all possible despatch in the delivery of the cargo. In case, however, the vessel proceeds to the Mill before receiving our notice that the cargo will be delivered there as fast as vessel can receive it, *it must be understood that you thereby waive provision "T"* (line 81) *of the Charter Party and claims to demurrage."* (Libelant's 1-D[1].)

No further communication passed between the parties until October 12th, when Hind, Rolph & Company wired Mr. Ostrander as follows:

> "Owing to the supply of logs and the general ability of the Port Angeles Mills and Timber Company Port Angeles Washington to *manufacture with dispatch the cargo* for the Levi W. Ostrander would now advise in case you have not acted on our previous instructions that this vessel be ordered to the Port Angeles mill when she is ready to load cargo. We are *informed* that work is still being done completing this vessel. Will you kindly telegraph us if this is correct and if so when the vessel will be ready to receive lumber at Port Angeles." (Libelant's 1-E[1].)

An immediate reply in the following form was made by Mr. Ostrander:

> "In accordance your today's wire have ordered tug to take Levi W. Ostrander from Tacoma tomorrow for Port Angeles. *Vessel has at all times since August twenty-fifth been ready to load cargo* and I now repeat former notice that demurrage will be claimed from that date." (Libelant's 1-F[1].)

A tug was procured and the schooner towed to Port Angeles. She arrived there on Sunday, October 14th. Upon the arrival of the schooner at the mill at Port Angeles, Charles Nelson & Co., refused to furnish any lumber until the Captain signed a demurrage release. A dispute concerning this matter consumed two days. Immediately thereafter

Charles Nelson Co., in breach of the provisions of the Charter-Party, refused to permit any stevedores, except such as were employed by them, to load the boat. Their alleged reason for this action was that the stevedores in their employ had charge accounts in the Mill Company's store and that the only way the Mill Company had to get its money out of these men was to give them employment. (173). Moreover, they demanded that the Captain of the Ostrander pay to the Mill Company ten per cent more than the wages of the stevedores. This dispute also consumed two days.

This dispute was finally settled by the Captain employing the stevedores of the Mill Company and Hind, Rolph & Company paying the additional ten (10) per cent.

On the morning of the 18th the schooner commenced loading. The Trial Court found "that the vessel could readily have been loaded in fourteen days." (445.) She was not, however, loaded until November 24th.

ARGUMENT

As we pointed out at the inception of this brief, the Trial Court refused to allow Mr. Ostrander's claim for demurrage for the entire period from

August 25th to October 14th because the notice of August 13th that the vessel would be ready August 25th was not sufficient to give the vessel a status of "arrived ship."

Just what the Court meant by this statement we are frank to say we do not know. We take it that it is the law that in order for a vessel owner to recover demurrage he must notify the charterer in some manner that the vessel is ready for loading. We quite agree, however, with Proctor for Cross-Appellees that the mere giving of a notice, though sufficient in form, is generally not all that is required to give the vessel the status of an arrived ship. If such were the case then a vessel which was to load at Shanghai could give notice to the charterer that the vessel would be ready to load at Shanghai on a certain date, even though the vessel at the time of the giving of the notice was in New York City. Again, we agree that such is not the law, but that in the ordinary case the vessel, in order to be considered an arrived ship, must arrive at the precise place designated in the Charter-party before her demurrage days can commence to run. We admit that if the charterer in this case had ever given us a definite, positive and unqualified order to send the schooner to a definite loading place that then the schooner would have been obliged to arrive

at such place before any demurrage could be claimed, except in the event that compliance with such order was waived by the charterer.

We say this much at the outset in order that our position may immediately be made plain and clear.

It may be that the Court meant by the language above quoted that a notice that a boat would be ready to proceed to a loading place on a day certain was insufficient and that the only sufficient notice was one which in terms announced that the boat was in fact at that moment ready. Or it may be that he meant that even if the notice given on August 13th, was sufficient nevertheless the vessel could not claim demurrage until she actually arrived at a loading place, even though the charterer never gave to the vessel owner a direct, positive and unqualified order to proceed to any definite loading port.

Even if it be a fact that the Court's opinion was based upon the first proposition alone, it nevertheless is true that Cross-Appellees in this case insisted in the lower Court that no recovery for demurrage for the period in question could be had because the vessel did not arrive at Port Angeles until October 14th. For that reason we will discuss both questions in this brief, though in order to

discuss the second question it will be necessary to anticipate the argument which conusel for Cross-Appellees will make.

THE NOTICE OF AUGUST 13TH WAS SUFFICIENT

The Charter-party does not prescribe any form in which the notice must be given or the time in which it is to be given. As a matter of fact the Charter-party makes no mention of notice of readiness at all. The boat, at the time of the execution of the Charter-party, was incomplete. In view of such circumstances we think it only natural that the notice which one would expect a ship owner to give would be a notice specifying when the boat would be ready to load her cargo. The notice in such case therefore would be given a few days in advance of the time when the boat would be ready. Moreover, we think that Hind, Rolph & Company expected to receive just the notice which was received by them. In their letter of July 2nd, 1917, (Libelant's 1-E) Hind, Rolph & Company say:

> "We will now thank you to let us know as early as possible just when you expect the vessel will be ready to load."

In compliance with this request Mr. Ostrander sent his telegram. This telegram of August 13th

was accepted by Hind, Rolph & Company as sufficient notice for on August 14th they wrote Mr. Ostrander and after quoting the telegram of the 13th said:

> (We) "beg to advise that we are notifying the mills that the Schr. 'Levi W. Ostrander' will be ready to load by August 25th." (Libelant's 1-G.)

Again, two days later, Hind, Rolph & Company wrote Mr. Ostrander and quoted a letter, or portion thereof, received by Hind, Rolph & Company from the Douglas Fir Exploitation & Export Co., in which the Douglas Fir Company said:

> "We, however, accept your notice of the 14th as evidence that the vessel is ready to load during August." (Libelant's 1-H.)

Now no question was ever made by Hind, Rolph & Company that the notice of August 13th was not a sufficient notice. They proceeded throughout on the theory that they were relieved from liability because of the strike clause in the Charter-party. They did not say to Mr. Ostrander: "We do not consider your notice of August 13th sufficient; that the only notice which will be sufficient is one which will be given when the boat is ready to receive cargo." If they had done so a notice of that character could and would have immediately been sent on August 25th. What they did say was: "We

accept your notice as a sufficient one. We cannot furnish cargo to your boat on August 25th because the cargo, by reason of the strike, will not exist."

EVEN IF NOTICE WAS INSUFFICIENT, THE GIVING OF A SUFFICIENT NOTICE WAS WAIVED BY HIND, ROLPH & COMPANY.

As we have said, notice of readiness to load was not, under the form of Charter-party in question, a condition precedent to be performed by the ship-owner, but even if it had been such a condition, compliance therewith was waived by Hind, Rolph & Company. The giving of a notice of readiness to load or discharge, even under a Charter-party requiring such notice, is to enable the charterer to be ready either to furnish the cargo or to receive it. What good purpose would have been served by Mr. Ostrander's giving a notice on August 25th? He had already been advised that no cargo could be furnished the schooner on that day or for some time thereafter. The charterer had informed him that they had notified the mills that he would be ready to receive cargo on August 25th. More than that, *they had accepted the notice as sufficient.* Now, if the charterer is informed that the ship is ready, if he receives such information either by formal notice being tendered to him or *in some*

other way, the ship owner has discharged the duty imposed upon him even though the Charter-party requires the giving of a formal notice.

In 268 Logs of Cedar, 2 Lowell, 378, 379, the Court said:

> "I do not understand that any formal notice need be given, if the brig was ready, and the *consignees knew it.* The master's notice would not bring on the lay days if the ship was not ready, and his failure to notify in form would not put them off, *if the other party was fully informed of the ship's being ready.*"

Again, in *Washington Marine Co. vs. Rainier Mill & Lumber Co.,* 198 Fed 142, 146, Judge Wolverton said:

> "A question has arisen respecting the notice to be given under the *stipulations* of the *charter parties* of the ship's readiness to begin discharging her cargo. I find that no notice was given in that respect as it pertains to any of the voyages, but I further find that the respondent was ready with its men to receive the lumber at the time the ship began discharging in each instance, *and that this fact constituted a waiver of the notice.*"

IT WAS NOT OUR FAULT THAT THE SCHOONER WAS NOT AN ARRIVED SHIP ON AUGUST 25TH.

As we have said before, we are compelled to anticipate on this question the argument of counsel

for Cross-Appellees. An elaborate brief, however, on this question was filed by him with the Trial Court. We have no doubt that the same position will be taken in this Court and we therefore proceed to demonstrate that the contentions made there, and which will be made here, are unsound. The general rule is, no doubt, that if a loading place is definitely named in the charter-party or if the charter-party gives the charterer a right to designate a loading place, then the vessel must proceed to the place either named in the charter-party or designated by the charterer before her lay days commence to count. The occasion for the general rule arises from the fact that the terms and conditions in charter parties relative to loading may be divided into three classes. These three classes of terms and conditions are set forth in Sec. 273 of the articles on Shipping and Navigation in Halsbury's Law of England (Vol. 26, p. 182):

> "(1) The charter-party may stipulate simply that the ship is to arrive at the specified port, without any further particularity or qualification. In this case the word 'port' must not be applied in its geographical, fiscal, or pilotage sense; the ship has not necessarily arrived within the meaning of the charter-party because she is within the geographical or legal limits of the port. The word must be construed in a commercial sense as meaning the commercial area known and treated as the port by all persons engaged in the shipping of

merchandise, whether as shippers, charterers, or ship-owners. The ship is not, therefore, to be considered as having arrived until she has reached the usual place in the port at which loading vessels lie. When she has reached this place the shipowner's duty has been fulfilled; *it is not necessary that the ship should actually be in the particular part of the port in which the particular cargo is to be loaded.* * * *

"(2) The charter-party may specify an area within a port, such as, for example, a basin, a dock, or a certain distance or reach of shore on the sea coast or in a river. In this case the ship is not an arrived ship within the meaning of the charter-party until she is within the specified area, but when once she is there the shipowner's duty is fulfilled, and it is not necessary that she should actually reach her loading berth before time begins to run against the charterer. * * *

"(3) The charter-party may specify the precise spot at which the physical act of loading is to take place, such as, for instance, a particular quay, pier, wharf, or spot, or, where the loading is to be performed by means of lighters and the ship is not to be in a shore berth, a particular mooring. In this case the ship is not an arrived ship, and the charterer's obligation to provide a cargo does not arise until she has actually reached the precise spot specified in the charter-party. The same principle applies when the actual loading berth is to be named by the charterer. In this case the charterer must name the berth within a reasonable time, otherwise he is liable for the consequences of his neglect or refusal to do so."

See also: *Scrutton on Charter Parties,* 8th Ed., Art. 39, p. 112.

An examination of the cases cited by counsel in the lower court and which no doubt will be cited here, will disclose that they fall within one of the three classes enumerated above.

In the case of *Aktieselskabet Inglewood v. Millar's Karri and Jarrah Forests, Lim.*, 9 Asp. 411, 88 L. T. 559, the charter-party provided that the "Inglewood" should proceed to Bunbury, or as near thereto as she could safely get, and there load as customary, always afloat, *at such wharf, jetty, or anchorage as the charterers' agent might direct,* a cargo of timber. The "Inglewood" proceeded to Bunbury and tied up to a mooring buoy in the outer harbor. The charterers ordered her to load at the jetty. The Court held, first, that if the charterers possessed a right to order the ship to a particular place of loading in a port, then the phrase "ready to take on cargo" in the demurrage clause meant "ready alongside the ordered place of loading."

With that doctrine we have no quarrel. The charter-party provided that the charterer had a right to order the boat to a jetty. If it had such right, and the charterer timely, positively and unqualifiedly ordered the vessel to proceed to the jetty, the vessel was not an arrived ship until she arrived at the jetty. The charterer in that case did give a direct, positive, timely and unqualified order.

Demurrage, therefore, ordinarily would not have commenced to run until the "Inglewood" arrived at the jetty. The "Inglewood," however, we may say, was allowed demurrage in that case, for the reason that other vessels employed by the charterer were lying at the jetty and prevented the "Inglewood" from going alongside. The Court said:

> "If a ship is prevented from going to the loading place, which the charterer has the right to name, by obstacles caused by the charterer or in consequence of the engagements of the charterer, the lay days commence to count as soon as the ship is ready to load, and would, but for such obstacles or engagements, begin to load at that place."

In *Nelson v. Dahl,* 12 Ch. Div. 568, 4 Asp. 172, the charter- party provided that the vessel should proceed to London Surrey Commercial Docks, or so near thereto as she may safely get, and lie always afloat, and deliver to the charterers the cargo. Before the ship arrived in the Thames the charterers endeavored to procure a berth for her to discharge in the Surrey Commercial Docks, but owing to the crowded state of the docks, they were unable to do so, and when she arrived she was unable to get into the docks, and had to lie out some time in the river at the Deptford buoys. Eventually the cargo was discharged by lighters, employed by the shipowners, into the Surrey Com-

mercial Docks. The Court proceeded to enquire, first, as to under what circumstances a ship might be considered an arrived ship. It announced the law in accordance with the statement hereinabove quoted from Halsbury's Laws of England (Vol. 26, pp. 182, 183, 184). It further held, however, that under the language of the particular charter-party, the vessel was not compelled to await a loading berth at the Surrey Commercial Docks, and that consequently it was the duty of the charterer to take delivery of the cargo by lighters at the Deptford buoys, for that was the place *near to the Surrey Commercial Docks where the vessel might safely get.* Demurrage was, therefore, allowed the shipowners.

In *Tharsis Sulphur and Copper Co. Ltd. v. Morel Brothers & Co. and Richards & Co.,* 2 Q. B. 647, 7 Asp. 106, the charter-party provided that the shipowner should load the copper ore at Huelva, "and being so loaded shall therewith proceed to the Mersey (or so near thereunto as they may safely get) and deliver the same at any safe berth in the dock at Garston." On arrival of the vessel at the Garston dock the charterer promptly, positively and unqualifiedly named a berth at which the boat was to be discharged. Every berth, however, in the Garston dock was full and the vessel was detained

some time in getting a berth. The Court held that inasmuch as the charter-party gave the charterer the right to name a berth, the ship was not an arrived ship until it reached the precise loading berth named.

In *Leonis Steamship Co. Ltd. v. Joseph Rank, Ltd.,* (1918) K. B. 499, the charter-party provided that the charterer had the option of loading a cargo on the "Leonis" at Bahia Blanca. The vessel went to Bahia Blanca and anchored in the river within the port about three ship's lengths from the railway pier. The Court held that the provision of the charter-party implied that the vessel was to go to a usual loading place in the port, and that the place to which the captain went was *not* a usual loading place.

In *Anderson v. Moore,* 179 Fed. 68, the charter-party provided that the vessel should go to Newcastle, N. S. W., take on a cargo of coals, "and being so loaded, shall proceed to San Francisco Harbor, Cal., to discharge at any *safe wharf or place* within the Golden Gate, and deliver the said full and complete cargo in the usual and *customary* manner at any safe wharf or place, or into craft alongside, *as directed.* * * * To be discharged as *customary, in such customary* berth as consignees shall *direct.*" The "Columbia" was chartered

on June 26, 1907, but the coal which she carried had been sold to the Western Fuel Company under a contract made on November 24, 1906. When the "Columbia" arrived at San Francisco, J. J. Moore, the president of the chartering company, told the captain of the vessel that the cargo of coal had been sold to the Western Fuel Company and that the ship would dock at their bunkers. This, the charterer in that case had a perfect right to do, for the charter-party provided that the coal was to be discharged in such customary berth as the consignees should direct. Prior to the time of the arrival of the "Columbia," however, there had been a coal famine, and at the time of her arrival the dock at the bunkers of the Western Fuel Company was filled with vessels carrying coal. "It was shown to be the custom of the port that vessels arriving in port were discharged in the order of their arrival, and this custom was observed in the present case, with the unimportant exception that a schooner which arrived after the "Columbia" was permitted to discharge 300 tons at the Western Fuel Company's bunkers on February 22nd, a national holiday." The Court said:

> "When did the lay days begin to run? Under the charter-party they did not begin to run until the ship was 'ready to discharge' *'in such customary berth as the consignee shall direct.'* The court below held, and we find no error in

> its conclusion, that under such a provision in the charter-party the vessel is not ready to discharge until she is in position to deliver her cargo to the consignee in the berth which he designates to her."

We have no quarrel with that case. Under the terms of the charter-party the charterer or consignee had a right to direct that the vessel should be discharged a tthe dock of the Western Fuel Company. She was to be discharged as customary and it was proven to be the custom that vessels should await their turn. The charterer timely and positively exercised his option of naming the berth, and the vessel was discharged in her turn.

But how are these cases applicable to the facts in the case at bar? We admit that the charterers were entitled to designate a usual, safe loading place on Puget Sound at which the "Ostrander" was to be loaded. But can it be said that they could delay indefinitely, after they had been given notice of readiness of the boat to load, the naming of such loading place? If so, they might have delayed the naming of such a place for the period of a year and still not be liable for damage accruing by the detention of the vessel. The charterers, it is true, had the option of ordering a boat to any safe, usual loading place on Puget Sound, but they should have given a prompt, direct, positive, abso-

lute and unqualified order. Did the charterers give such an order in this case? Let us see. The charter-party provided that the vessel should proceed "to a loading place on Puget Sound to be designated by charterers prior to June 30, 1917," (Charter-Party, line 6) "for a voyage from a usual safe loading place on Puget Sound (Washington) as *ordered* by charterers or their agent." It will be noted that the charterers had a right to name only one loading place, and that this loading place was to be named prior to June 30, 1917. We make no point, however, of the fact that a loading place was not named prior to June 30, 1917. We are frank to say that we do not believe that the naming of the loading place prior to June 30th was a condition precedent; but even if it were a condition precedent, we think the shipowner in this case has waived compliance therewith by the charterers.

On the same day the charter-party was executed Hind, Rolph & Company entered into a contract of purchase with the Douglas Fir Exploitation and Export Company. This contract provided that the cargo might be loaded at not more than two accessible loading places in any one district where vessel can safely lie always afloat. (Libelant's 1-Q.) On May 26th Hind, Rolph & Company wrote Mr. Ostrander as follows:

> "In order to arrange for the *despatch in accordance with the charter,* at the loading port, *we have had to agree that the vessel would load at TWO mills.* The two mills, of course, will be in the same *district,* so that the shift can be made within a very short time. In view of this circumstance, we hope that in due time you will be able to permit loading at a second mill." (Libelant's 1-B.)

At the very outset, therefore, it will be noticed that the charterers were announcing that although the charter-party provided for loading at only one port, yet the charterers, in order to obtain despatch for the boat, would have to load at two ports. On June 28th, Mr. Ostrander in a letter to Hind, Rolph & Company said:

> "You wrote some time ago asking for the privilege of two loading ports, and while I should very much prefer to load at one, I will, of course, in case of absolute necessity, agree to a second." (Libelant's 1-D.)

Six days prior to the date of the last letter, the Douglas Fir Exploitation and Export Company had placed its contract for the purchase of the lumber with Charles Nelson Company. That contract provided that the lumber was "to be delivered at Mill wharf at *Mukilteo and Port Angeles.*" (Libelant's 1-R.) On July 2nd, four days after Mr. Ostrander wrote his letter to Hind, Rolph & Company agreeing, in case of absolute necessity, to load at two ports, Hind,Rolph & Company wrote Mr. Ostrander as follows:

> "In regard to the loading would say that it has been necessary for us to receive this cargo at two ports, so that with your permission we will load her at the Crown Lumber Company, Mukilteo, and the Puget Sound Mills & Timber Co., Port Angeles." (Libelant's 1-E.)

On August 13th Mr. Ostrander notified Hind, Rolph & Company, by telegram, that the vessel would be ready for cargo by August 25th. (Libelant's 1-F.) On August 14th Hind, Rolph & Company wrote Mr. Ostrander as follows:

> "Owing to the strike situation, we do not known at present just how far the mills have gotten along with this cargo but we have asked to be defintely advised and will let you know as soon as possible all particulars." (Libelant's 1-G.)

Up to this point, at least, it will be noticed that Hind, Rolph & Company have been claiming an option not provided for by the charter-party, namely, the right to load at *two* mills, and wherever the mills have been named the Crown Lumber Company at Mukilteo had been named first.

On the 16th of August (Libelant's 1-H) Hind, Rolph & Company wrote Mr. Ostrander saying that they were just in receipt of the following letter from the Douglas Fir Exploitation and Export Company:

> "Acknowledging your favor of the 14th, this cargo has been placed by us with the Charles Nelson Co., who in turn placed it with the Port Angeles Mill, but now that the strike has come on since this has been done, it is just possible that when the labor troubles are over and the mills are again able to operate, they may want to cut part of its at *Mukilteo* and part at *Port Angeles,* which will be their privilege to do. If, however, the vessel insists on going to the mill, she may go to Port Angeles, *but her lay days cannot commence to count until the mill is able to take care of her, this, on account of the general strike.*"

The letter from Hind, Rolph & Company continues:

> "We are sorry that owing to the strike situation, there is a possibility of the vessel being delayed, but hope that the mills will be able to load the vessel when she is ready."

Now, in the first place, it will be noticed that the Douglas Fir Exploitation and Export Company placed the contract for the cargo with the Charles Nelson Company, who in turn placed it with the Port Angeles mill. The contract of June 22nd, however, (Libelant's 1-R) shows that the contract for the lumber was placed, not at the Port Angeles mill only, but at *Mukilteo* as well. The statement, however, that "if the vessel insists on going to the mill, she may go to Port Angeles, but her lay days cannot commence to count until the mill is able to take care of her, this, on account of the general

strike," is the order relied upon by cross-appellees in this case and which, it is claimed, directs us to go to a usual, safe loading place on Puget Sound. It is, however, not a direct, positive and unqualified order. It is true that it says that if the vessel insists on it, she may go to the Port Angeles mill; *but there is tacked onto this order the qualification that if the vessel does so, she is to waive all claim for demurrage.* The charterers, it is true, in this case had the option of ordering the vessel to go to Port Angeles. But that option did not carry with it the further option that the shipowner should waive that which was justly due him if he complied with the direction given him. Suppose the "Ostrander" had gone to Port Angeles on August 25th. When her cargo would have been delivered to her, no one knows; for it is the contention of the respondents in this case that they were under no obligation to furnish a cargo until conditions at the mills became normal, and it is their further contention that conditions are not normal even now. (See Testimony of Scott, p. 204.) At any rate, we know that a long delay would have occurred in the furnishing of the cargo. The charterers would not have voluntarily paid demurrage. When Mr. Ostrander sought to recover it, the defense of the charterers unquestionably would have been that having gone to Port Angeles, he had waived any

claim for demurrage. The only attempt made to answer our contention that we were entitled to an order which did not have attached to it an assertion that by obeying same we were to relinquish a sum of money justly due us, is that such assertion was "merely an expression of a legal opinion, with the correctness of which libelant was at liberty to disagree." But that is not the kind of an order we were entitled to. We were entitled to a direct and unqualified order, not to one which said, "Obey it, and we will keep the boat as long as we desire, without penalty." In substance, then, the letter of August 16th comes to this: "It is a mere idle and senseless formality for the vessel to proceed to any loading place; but if the vessel insists on complying with this idle and senseless formality, then she may go to Port Angeles. But if she does go to Port Angeles, you thereby waive any claim which you may have, however just, for demurrage." Moreover, the subsequent correspondence between the parties shows that it was not definitely intended that the vessel should proceed to Port Angeles. After the letter of August 16th, Mr. Ostrander offered to cancel the charter-party on terms fair to both parties. (Libelant's 1-J.) This offer was declined by Hind, Rolph & Company because prices had advanced. (Libelant's 1-I.) On September

14th Hind, Rolph & Company wired Mr. Ostrander as follows:

> "Your day letter today: It is difficult for us to assist matters to any great extent from this end but suggest that you communicate with Mr. A. A. Scott, manager of Charles Nelson mill either at *Mukilteo* or Port Angeles regarding the loading." (Libelant's 1-N.)

On the same day they sent Mr. Ostrander a copy of their contract with the Douglas Fir Exploitation and Export Company and a copy of the contract between the Export Company and the Charles Nelson Company. It will be remembered that the contract between the Export Company and Hind, Rolph & Company provided that the cargo might be delivered at the mill wharf *either at Mukilteo or Port Angeles.* In the same letter in which the copies of these contracts were enclosed Hind, Rolph & Company say:

> "As suggested in our telegram, we believe best results can be obtained by your communicating with Mr. A. A. Scott at Port Angeles or Mukilteo." (Libelant's 1-P.)

On September 19th Mr. Ostrander wired Hind, Rolph & Company stating that he would claim demurrage from and after August 25th. (Libelant's 1-T.) To this Hind, Rolph & Company replied as follows:

"Your night letter of 19th regarding charter of Levi W. Ostrander received and our recommendation is that you confer with Mr. Scott placing you vessel in his hands and *waiving your alleged claim for demurrage.*" (Libelant's 1-U & V.)

On September 22nd Mr. Ostrander wired Hind, Rolph & Company as follows:

"Will move vessel to any port on Puget Sound only on receiving orders so to do from you." Libelant's 1-X.)

On October 9th Hind, Rolph & Company wrote Mr. Ostrander as follows:

"We shall furnish the cargo to the vessel at the wharves of the *Crown Lumber Co. at Mukilteo* and the *Puget Sound Mills & Timber Co., Port Angeles,* as soon as the conditions resulting from the strike permit. * * *

"As soon as conditions at the wharves named have become such that the cargo can be delivered to the vessel as fast as she can receive it, we will notify you of that fact so that you may then proceed to the *first loading place* at Mukilteo, in case you desire to keep the vessel at Seaborn Yard, Tacoma, until then.

"We would suggest again, however, that the vessel would save time if, instead of waiting at Seaborn Yard after being ready to load, she proceeded to the loading wharf at *Mukilteo* and there accepted the cargo as fast as the mill will deliver it. We are assured by the mill that it will use its best efforts to give you all possible despatch in the delivery of the cargo.

> "In case, however, the vessel proceeds to the mill before receiving our notice that the cargo will be delivered there as fast as vessel can receive it, it must be understood that you thereby waive provision 'T' (line 81) of the charter-party and *any claims to demurrage.*" Libellant's 1-D[1].)

Now, it will be apparent that at all times after the letter of August 16th it was never ordered by the respondents that the vessel should proceed to Port Angeles. It was at all times said that the vessel would be compelled to load at two ports, the first one of which was Mukilteo, and the direction to proceed to Mukilteo was coupled with the statement that if she did so proceed, all claims for demurrage would be thereby waived. It will also be noticed that on October 9th Hind, Rolph & Company said that the first loading place would be at Mukilteo and that they had been assured that the vessel would be given all possible despatch at that port in the delivery of the cargo. But Mr. Scott testified that the vessel could not have been loaded at Mukilteo because of the fact that "the Crown Company's commitments were all full.. (P. 230.)

However that may be, the record abundantly discloses that no positive, unqualified order was ever given the "Ostrander" to go to any loading place until the telegram of October 12, 1917, when Hind,

Rolph & Company, for the first time, gave a direct, positive and unqualified order that the vessel should proceed to Port Angeles.

In Carver on Carriage by Sea, (6th Ed.) §224, it is said:

> "If the loading port is not named in the charter-party, but remains to be deterined by the charterer, he must, subject to special agreement, name it before he can require the ship to sail. Thus, where she was to proceed to a 'safe port near Capetown,' it was held not to be enough that the charterer was ready to put an agent or supercargo on board, who would give the order later. And if the charterer delays unreasonably in naming the port, he will be liable for the shipowner's loss by the detention of the ship."

The case nearest in point which we have been able to find is that of *Mobile & Gulf Nav. Co. v. Sugar Products Co.,* 256 Fed. 392. In that case the charter covered two vessels and the charterer had the right to name one of two ports of loading. On April 24th the shipowner notified the agent of the charterer that the vessels would be ready in a few days to proceed to port of loading and asked what port they should proceed to. No prompt answer having been received, the master again requested the charterer to name the port of loading. The request was made the third time. On May 3rd, the charterer wired the master as follows:

> "Providing you waive all rights demurrage to date, will load smaller vessel Bahia Honda, larger one Havana."

The master refused to waive his claim for demurrage and again demanded that loading port be named. Eventually one was named. The court said:

> "As the charterer was to provide the cargo for the vessel, it is manifest to me that the option as to port of loading was put into the charter-party for the benefit of the charterer, so that he might direct the vessel to the port at which he had assembled his cargo. I therefore hold that the duty was on the charterer to name the port of loading. It was therefore the *duty* of the *charterer,* when he *knew* the vessels would *shortly be ready,* and was asked as to which port the vessel should proceed, *to inform the vessel promptly,* so that it could proceed without delay."

Other cases involving loading, under the circumstances herein set forth, are probably not to be found. But there are several cases relating to discharge which, while not squarely in point, are with us in principle. The fact that they relate to discharging and not to loading is immaterial.

In the case of *The Silverstream,* Vol. 10, Eastern Law Reporter, p. 73, the owners of the ship "Silverstream" brought an action to recover demurrage. The charter-party provided that the "Silverstream" should proceed to a named port and there load for

another port, as ordered, on signing bills of lading. The charterers ordered the boat to proceed to a port of discharge not named in the bill of lading. The Court said:

> "It seems clear to me that the ship has been detained by the charterers not naming a port of discharge or destination within the charter. Negotiations to agree on a new port failed, the captain being willing to agree to a port of destination not named in the charter provided his right to demurrage at the port of loading was recognized and the amount thereof adjusted. His right to any demurrage at the port of loading was denied, and as I have already decided, wrongfully denied.
>
> "The charter requires the captain, after receiving a cargo, to proceed to one of five ports as ordered on signing bills of lading. The bills of lading have not been presented,—except to a port not named, and the ship has consequently for some time since taking on her cargo, been detained here. This detention could have been avoided at any time by the charterers presenting bills of lading or naming any one of the five ports indicated in the charter, and is detention for which the charterer is responsible."

The note of the reporter to the above case is as follows:

> "It was ordered that the owners of the 'Silverstream' were entitled to demurrage under the charter-party from and including the 7th day of July, 1911, and for every working day thereafter at £14.7.9 per day until a port of destination was ordered as provided in the charter-party."

In the case of *Schele et al v. Lumsden & Co.,* 53 Scot Law Reports, page 581, the facts were that the charter-party provided that the ship being loaded with a cargo of pit props belonging to the charterers should "proceed to a good and safe place in the Firth of Forth and there deliver the same." The charter-party contained a strike clause. The vessel arrived on March 20th. Owing to lack of space it was forbidden to stack props on the quay and it was consequently the duty of the charterers to have cars available to haul the props away as soon as they were unladen. A coal shortage, however, existed, owing to a strike, and the Railroad Company refused to haul cars unless coal was provided for the locomotive. The vessel master refused to pay an exorbitant price for coal and in consequence the vessel did not get in berth until April 9th. The vessel owner having brought an action for demurrage, the charterers contended that the strike clause in the charter-party exonerated them from taking delivery on arrival of the ship. The nisi prius judge held that there was an "absolute obligation" on the part of the charterers so to do. Having been defeated on this point

> "the defenders took another point—*how can one talk* (they say) *of obligation to take delivery on 21st March, seeing that the vessel was not in a berth till 9th April?*"

To this contention the Court gave a sensible answer:

> "If it was the receiver's duty to provide the coal they were themselves the sole cause of the fact that this vessel did not at once occupy a berth on her arrival in dock. *From 20th March onwards both parties knew* (1) *that no business could be done till coal was supplied, and* (2) *that business would begin* as soon as coal was supplied. And as a matter of fact the vessel was actually in her berth when the receivers were ready to do business with her, i. e., on 9th April. I cannot gather that the lack of actual mooring at a berth troubled anyone till the case *came into the hands of the lawyers,* and certainly the receivers neither did anything nor said anything about the ship getting a berth. But Mr. Horne was very emphatic that it was the duty of the ship to go through the *empty form* of getting herself moored to a berth before time could begin to run against the receivers."

In *268 Logs of Cedar,* 2 Lowell, 378, 379, Judge Lowell said:

> "The evidence proves that part of the homeward cargo was discharged at one wharf and part at another; and no objection appears to have been made by the owners of the brig to this mode of unloading, and I assume it to have been proper and according to the usages of the trade. * * * *But it is proved that the charterers neglected for two or three days after the first part of the cargo was taken out to name the place at which the remainder was to be delivered; and for this time they must pay."

THE "ARRIVED SHIP" THEORY NO DEFENSE IN ANY EVENT.

Other considerations compel the same conclusion. Let us assume now, for the sake of the argument only, that the letter of August 16th did constitute a direct and unqualified order, and that the arrival of the schooner at Port Angeles by August 25th, under the circumstances existing in this case, not an "empty form" *(Schele v. Lumsden)* but a condition precedent. Having made such concession, for the sake of the argument, yet even so, the cross-appellant is entitled to recover for demurrage between August 25th and October 15th, for the reason that Hind, Rolph & Company waived the breach of this condition precedent. A waiver of a condition precedent converts the condition precedent into a simple term of the contract and its breach does but give an action for damages, if any damage occur. Manifestly, no damage occurred to the charterers in this case by reason of the vessel not going to Port Angeles on August 25th, and consequently that question is not involved herein.

In the case of *Bentsen v. Taylor, Sons and Co.,* (1893) 2 K. B. 274, 7 Asp. 385, the charter party provided that a ship described as "now sailed or about to sail from a pitch pine port to the United

Kingdom," should "after discharging homeward bound cargo with all convenient speed sail and proceed to a good and safe loading place as may be directed by the charterers at Quebec," and there load a timber cargo for the United Kingdom. The charter party was dated March 29, 1892, and at that time the shipowner and charterers knew that the ship was at or had just left the port of Mobile and was going to Greenock. The ship, however, did not leave Mobile until the 23rd of April. She arrived at Greenock on the 5th of June, sailed for Quebec on the 18th of June, and arrived there on the 7th of August, when the charterers refused to load her. The Court held, first, that the statement in the charter party that the ship had sailed or was about to sail from a pitch pine port to the United Kingdom was a condition precedent. Lord Esher quoted the following from the opinion in the case of *Behn v. Burness,* 3 B. & S. 751:

> "Now the place of the ship at the date of the contract where the ship is in foreign parts and is chartered to come to England may be the only datum on which the charterer can found his calculations of the time of the ship's arriving at the port of loading. A statement is more or less important in proportion as the object of the contract more or less depends on it. For most charterers, considering winds, markets, and dependent contracts, the time of a ship's arrival to load is an essential fact for the interest of the charterer. In the ordinary

> course of charters in general it would be so: the evidences for the defendants shows it to be actually so in this case. Then if the statement of the place of the ship is a substantive part of the contract, it seems to us that we ought to *hold it to be a condition precedent* upon the principles above explained, unless we can find in the contract itself or the surrounding circumstances reason for thinking that the parties did not so intend."

Lord Esher then continues:

> "The present case is exactly within these words, and, as there is nothing in the contract leading us to a contrary conclusion, we must hold that this statement is a *condition precedent*. The ship had not sailed, nor was she nearly loaded and about to sail, so that there was a *breach* of the *condition*. The defendants then had a right to treat the contract as at an end, or, if they chose, to treat it as still subsisting."

(So in the case at bar. The charter party provided that "should not vessel have arrived at port of loading on or before twelve o'clock noon of the 31st day of August, 1917, charterers to have the option of cancelling the charter party." If, therefore, the notice was a direct and unqualified order to proceed to Port Angeles and the vessel did not arrive there by August 31st, Hind, Rolph & Company had a right to cancel the charter party, or they could treat it as still subsisting.)

"If they chose to treat it as at an end, they were bound in so doing not to lead the plaintiff to believe that the contract still subsisted. The result of the defendant's letter was to leave the plaintiff under the impression that he was still bound to carry out his contract, and therefore the defendants cannot now treat it as at an end. But if they have sustained any damage through the breach, that matter will be referred to an arbitrator under the agreement made by them with the plaintiff. *The plaintiff is therefore entitled to judgment on his claim for freight, and the defendants to judgment for the plaintiff's breach of contract.*"

Bowen, L. J., said:

"In order to succeed, the plaintiff must show either that he has performed the condition precedent, the onus being on him, or that the defendants have excused the performance of the condition, and we have to consider whether the plaintiff has sustained that burden, so that no reasonable man could doubt that there has been a waiver of the condition or an excuse of its performance. * * * In my opinion the plaintiff has sustained the burden which lay upon him to prove a waiver of the condition, and therefore his appeal ought to succeed, and judgment ought to be entered in the way which the Master of the Rolls has suggested."

Kay, L. J., said:

"If it were necessary to decide this point, I should be of opinion that these words amounted to a condition rather than to a mere warranty. But it is not really necessary to decide the point, for, if there was a condition precedent, *I have no doubt as to the waiver.* * * * The defendants are therefore liable for their refusal to load the ship."

Now in the *Bentsen* case it will be noticed that the ship did not take on board a cargo at all, but that the Court held that the shipowner was entitled to the freight for the voyage contemplated by the charter party. It said, however, that if the charterers had suffered any damage by reason of the fact that the vessel did not sail from Mobile until some considerable time after the charter party declared she had sailed, the charterers were entitled to such damage as an offset. It also held, however, that if the charterers subsequently ascertained that the vessel had not sailed from Mobile and did not declare the contract at an end, as they had a right to do, they had waived the condition precedent.

Now in the case at bar Hind, Rolph & Company certainly knew that the "Ostrander" did not go to Port Angeles on August 25th. They therefore waived the condition precedent. If they suffered any damage by reason of the fact that the "Ostrander" did not go to Port Angeles on August 25th, that damage might be recovered. But the evidence, of course, discloses that they suffered no damage. It would be difficult to advance an argument which would allow the shipowner in the *Bentsen* case to recover his freight money for a cargo which he never carried, and deny to libelant in this case his claim.

In the case of *Atlantic & M. G. S. S. Co. v. Guggenheim,* 123 Fed. 330, the shipowner brought an action for demurrage. The contract between the shipowner and the charterers provided that "we are to keep the vessels a regular period apart as much as possible, giving you full information as to their movements." The charterers in that case contended that the vessels were not kept a regular period apart and that the delay in loading was caused thereby. The Court said:

> "It is conceded by the respondents that they did not avail themselves of any right of cancellation they might have had but they contend that they did not by their conduct deprive themselves of a right to claim damages for a breach of the contract and to set them up by way of defense in this action, citing Scrutton on Charter Parties (4th Ed.) p. 60. The principle involved is there stated:
>
> '*The breach of a condition precedent* being waived by one party in so far that he does not repudiate the contract converts the condition precedent into a simple term of the contract, its breach giving an action for damages.'
>
> The respondents, however, have not proved that they had suffered any damages, nor do they seek to offset any claim of that character, but to defeat the libelant's right of action or to substantially reduce its recovery. It is not clear that they would be entitled to do so, if there were any merit in the claim, which is doubtful. The respondents accepted the vessels and loaded them, without demur or protest, and paid the freight earned on all three trips

> without a suggestion that there had been any breach of contract or that they had suffered any damages by reason of the late arrival of the vessels at Pensacola."

So in the case at bar. Mr. Ostrander, in August, offered to cancel the charter on terms fair to both parties. Hind, Rolph & Company refused. Again, *after* the schooner arrived at Port Angeles, Hind, Rolph & Company wired Mr. Ostrander that "We wish it distinctly understood we are not abandoning charter." It is true that at that time they insisted they were not liable for demurrage, but their claim to exoneration was based upon the *strike clause* and not upon the fact that the ship was not an "arrived ship" until October 14th. The "arrived ship" reason for exoneration did not "trouble anyone till the case came into the hands of the lawyers." (*Schele v. Lumsden, supra.*)

We maintain, therefore, *first,* that Hind, Rolph & Company never gave a direct and unqualified order to the schooner to proceed to Port Angeles until October 12th; that the letter of August 16th did not constitute a direct and unqualified order; and, *second,* that even if the letter of August 16th did constitute a direct and unqualified order, and the arrival of the schooner at Port Angeles was a condition precedent to the right to recover, yet Hind, Rolph & Company had waived compliance with such condition

precedent and by such waived such condition precedent became but a term of the contract, a breach of which would render us liable in damages to Hind, Rolph & Company if such damages occurred (which is not the case), but would not constitute a defense to our claim for demurrage.

We submit, therefore, that cross-appellant is entitled to demurrage for the period between August 25th and October 12th.

Respectfully submitted,

CHADWICK, MCMICKEN, RAMSEY & RUPP,
Proctors for Appellee and Cross-Appellant.

No. 3426

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

HIND, ROLPH & COMPANY (a copartnership), and 1,727,783 feet of lumber loaded on board the schooner "LEVI W. OSTRANDER", and FIDELITY DEPOSIT COMPANY OF MARYLAND (a corporation),

Appellants and Cross-Appellees,

vs.

H. F. OSTRANDER,

Appellee and Cross-Appellant.

BRIEF FOR CROSS-APPELLEES.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Proctors for Cross-Appellees.

PERNAU-WALSH PRINTING CO.

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Appellee and Cross-Appellant.

BRIEF FOR CROSS-APPELLEES.

Libelant (cross-appellant) claimed demurrage for the period from August 25, 1917, to October 14, 1917.

The lower court refused to allow this claim in its decree (448), and libelant appeals from this part of the decree (459).

The Facts.

(1) The charter-party provided that the vessel, when built, "shall proceed direct in ballast to a loading place on Puget Sound, *to be designated by charterers* * * *". On July 2, 1917, respondents designated "Crown Lumber Mill Company, Mukilteo, and the Puget Sound Mills and Timber Company, Port Angeles", as the loading mills (31).

(2) The charter-party did not name a definite time at which the laydays should commence, or within which the loading should be completed.

(3) Libelant's claim is based upon the following allegation in the libel:

> "That upon the 25th day of August, 1917, said vessel being then in all respects ready to receive and commence loading her said cargo, said libelant notified said respondents of such fact, and asked said respondents to designate the mill or loading port at which said cargo was to be loaded * * *" (5).

(4) The notice so referred to in the libel, and upon which libelant relies as a basis for this claim, was a telegram sent by him to respondents, on *August 13, 1917*, reciting that "Schooner Levi W. Ostrander will be ready for cargo by August 25th" (271-272). On the date of this notice the schooner was in cross-appellant's yards, still in course of construction.

(5) There is no evidence in the record to support the allegation that "upon the 25th day of August, 1917, said libelant notified said respondents" of the fact alleged in the libel, or of any fact whatever; nor did

libelant in fact give any notice whatever to respondents on August 25.

(6) On *August 16, 1917,* respondents wrote to libelant:

> "If the vessel insists on going to the mill, she may go to Port Angeles" (33).

(7) The vessel did not insist on going to the loading place, but chose to remain at Seaborn Yards (100 miles from loading place) until October 13, 1917.

(8) The evidence shows that, on August 13, when the notice was given, the vessel was *not* in all respects ready to receive and commence loading any cargo. Admittedly work was done on her between August 25 and October 14.

(9) However that may be, the evidence shows conclusively that, on August 13, and on August 25, and at all times down to October 15, the vessel was not ready to receive and commence loading *"her said cargo",* viz.: the cargo which she had agreed to load, being a cargo of lumber at Port Angeles. To receive and load such a cargo, it was necessary for her to first perform her first duty to respondents under the charter-party, viz.: to *"proceed direct in ballast"* to the designated loading place at Port Angeles. She did not so proceed until October 14.

(10) The charter-party clause relied upon by libelant in support of his claim for demurrage provides for payment of $250 per day—not for every detention of the vessel, but only for "detention *by default of said party of the second part"* (Charterer) (13).

We reserve the contention made in our appeal that this provision, under the charter, applies only to the discharge of the vessel; but assuming that it applies to detention at the port of loading, cross-appellant must show, in order to support his claim, that the vessel was detained at the loading port, between August 25 and October 13, by default of cross-appellees.

THE FACTS ARE THAT SHE WAS NOT, IN FACT, AT THE LOADING PORT AT ANY TIME WITHIN THIS PERIOD; THAT, CONSEQUENTLY, SHE WAS NOT DETAINED THERE. THE FACTS ALSO SHOW THAT SHE WAS NOT DETAINED AT SEABORN YARDS, WHERE SHE WAS BUILT, BY CHARTERERS OR ANY ONE FOR WHOM THE CHARTERERS WERE RESPONSIBLE.

A. *The vessel was not in fact ready to receive and commence loading her cargo at any time within the period for which demurrage is claimed.*

B. *The notice of August 13th did not make charterers responsible for demurrage.*

C. *There was no "detention by default of" respondents.*

The Law and Argument.

A. When, on July 2nd, charterers wrote to the owner: "We will load her at the Crown Lumber Company, Mukilteo, and the Puget Sound Mills & Timber Company, Port Angeles", and when thereafter, on August 16th, the charterers wrote to the owner: "She may go to Port Angeles", the legal effect was the same as if the mill of the Puget Sound Mills & Timber Com-

pany, at Port Angeles, had been originally inserted in the charter-party as the agreed loading place.

Aktieselskabet Inglewood v. Millar, 9 Asp. 411.

The first charter-duty, after the vessel was built, was the duty imposed upon the owner, that "the vessel shall proceed direct in ballast to a loading place on Puget Sound, to be designated by charterers". After the designations made on July 2nd and August 16th, the initial duty, upon which all the other obligations of the charter-party were conditioned, was the duty of the vessel to proceed to the mill of the Puget Sound Mills & Timber Company at Port Angeles.

During the entire period for which now demurrage is claimed the vessel remained in her owner's shipyard, where she was built, 100 miles from the agreed loading place.

The first charter-duty imposed upon the *charterer* was the duty *"to furnish to said vessel, at designated loading place",* a full cargo. Obviously the charterers' duties did not, and could not, begin until after the vessel was at the designated loading place. The owner's duty to have the vessel at the agreed loading place was a *condition precedent* to be fulfilled by the owner before he was entitled to call upon the charterers to perform their charter-duties, and particularly before he could make any plausible claim that time was beginning to run against the charterers so as to charge the latter with laydays and embryo demurrage.

The principles are stated, in classical form, by the Earl of Halsbury, in "The Laws of England", volume 26, beginning on page 177:

Sec. 268: "Where the ship in which the goods are to be carried is employed under a charter-party, certain *conditions* must be fulfilled by the shipowner *before* he is entitled to call upon the charterer to ship his goods. *The ship must be at the place of loading contemplated by the charter-party;* she must be ready to receive the goods on board, and notice of readiness must have been given to the charterer."

Sec. 269: "If the ship is not already lying in the port of loading at the time when the charter-party is made, she must proceed thither."

Sec. 271: "The shipowner is not discharged from his *duty to proceed to the port of loading* by reason of the fact that it has already become impossible for the ship to arrive there by the due date; nor can he call upon the charterer to extend the time or otherwise to indicate the intention of accepting or refusing the ship."

Sec. 272: "The ship must reach the port of loading specified in the charter-party * * *. If the port of loading is not specified in the charter-party, but is left to be named by the charterer, the effect of naming it is the same as if it had been specified in the charter-party * * *."

Sec. 273: "*For the purpose of demurrage and damages for detention time begins to run against the charterer from the arrival of the ship at her port of loading* * * *."

Sec. 210: "Time does not begin to run against the charterer until the ship has been placed at his disposal. *She is not at his disposal until she has reached the place named in the charter-party as the place where she is to take in her cargo* * * * *and until she is ready to do so.*"

No one doubts now that these are correct statements of the law of England, and the United States.

In *Anderson v. Moore,* 179 Fed. 68, this court says approvingly:

> "In Hutchinson on American Law of Carriers, sec. 848, it is said: 'Laydays at the port of loading do not begin to run against the charterer until the master gives notice to the charterer that his vessel is ready to receive cargo.' Such a notice can properly be given only after the ship is *ready and at her proper place for loading.* And the same authority says that the *charterers will not be liable* 'for a delay occasioned by the ship being unable to proceed to the designated berth, owing to the crowded condition of the dock'."

See also

> *W. K. Niver Coal Co. v. Cheronea S. S. Co.,* 142 Fed. 408.

In the article on "*Shipping*", 36 Cyc. 364, the rule is stated in these words:

> "In the absence of anything in the contract indicating a contrary intention the laydays do not begin to run until the vessel is in her berth * * * and where it is provided that the vessel shall proceed to a certain specified wharf * * * or one to be selected by the charterer, *the arrival of the ship at that wharf * * * is a condition precedent to the commencement of the running of the time* unless she is prevented from reaching the designated place through the active fault of the charterer, in which case the days begin to count at the time she would have reached it but for such fault."

It is not, nor could it be, claimed that either the charterers or the loading mill prevented the schooner from proceeding from the owner's shipyard to the wharf of the designated loading mill. The evidence

shows that, on August 16th, the owner was invited to send his vessel to the loading mill at Port Angeles.

The ruling principles are, indeed, admitted by the argument. Counsel says:

> "The general rule is, no doubt, that if a loading place is definitely named in the charter-party, or if the charter-party gives the charterer a right to designate a loading place, then the vessel must proceed to the place either named in the charter-party or designated by the charterer, before her laydays commence to count" (Opening Brief, p. 25).

The words cited by counsel from Halsbury's Law of England, sec. 273, are applicable:

> "In this case the ship is *not an arrived ship, and the charterer's obligation to provide a cargo does not arise until she has actually reached the precise spot specified in the charter-party*" (Opening Brief, p. 26).

The learned proctor for cross-appellant also reviews certain authorities (Opening Brief, pp. 27-32), anticipating that they should be cited on behalf of cross-appellees, which support the statements of the law made in Halsbury's work and in Cyc., above referred to. All of these erect insuperable obstacles in cross-appellant's path; but as the principles involved are elementary, and thoroughly familiar, we would consider it a waste of the valuable time of this court, and almost a reflection upon its learning, to extend this part of the argument.

To overcome the difficulties which the law has thus interposed to cross-appellant's claim, his proctor re-

lies up the contention that the charterers did not name a loading place until October 12th. The facts are, however, that, twice before the owner's so-called "readiness", on August 25th, the loading place was named: first on July 2nd, and again on August 16th. On July 2nd charterers wrote:

> "With your permission we will load her at the Crown Lumber Company, Mukilteo, and the Puget Sound Mills & Timber Company, Port Angeles."

On August 16th charterers, after referring to existing labor troubles, stated:

> "If the vessel insists on going to the mill, she may go to Port Angeles",

and again:

> "It might be well for you to keep in touch with Puget Sound Mills & Timber Company, Port Angeles, regarding the loading of the Levi W. Ostrander" (33, 34).

On October 12th, the charterers wired to the owner:

> "Owing to the supply of logs and the general ability of the Port Angeles Mills & Timber Company, Port Angeles, Washington, to manufacture with dispatch the cargo for the Levi W. Ostrander would now advise *in case you have not acted on our previous instructions that this vessel be ordered to the Port Angeles mill* when she is ready to load cargo. We are informed that work is still being done completing this vessel. Will you kindly telegraph us if this is correct, and if so when this vessel will be ready to receive lumber at Port Angeles" (43).

It is argued that this designation of the loading place is in some way impaired by the fact that charterers add-

ed to the words "she may go to Port Angeles" the words: "but her laydays cannot commence to count until the mill is able to take care of her, this on account of the general strike".

It is admitted that "the charterers in this case *had the option of ordering the vessel to go to Port Angeles*" (Cross-Appellant's Brief, p. 37). The addition of the words referring to the commencement of the laydays was *not*, as counsel suggests, an attempt to impose a "further option" upon the shipowner; it was the expression of an opinion, on a question of law, with which the owner was at liberty to disagree. It did not prevent him from sending his vessel to Port Angeles. It takes two parties to make an agreement; had the owner said nothing in response to the charterers' assertion, this assertion would not have been binding upon the owner; but if the owner considered it necessary to record a clear dissent from the charterers' views, he could have sent his vessel to Port Angeles, accompanying this act with a declaration that, contrary to charterers' assertion, laydays did commence to count and that no demurrage was waived.

The correspondence and the facts show that charterers were at all times willing that the vessel should proceed to the loading place when ready; that the circumstances created by the great strike made it impossible for the mill to deliver the cargo "to vessel at loading port as fast as vessel can receive it" (clause T of charter-party, Ap. p. 14), but that charterers suggested repeatedly "that the vessel would save time if, instead of waiting at Seaborn Yard after ready to load, she pro-

ceeded to the loading wharf * * * and there accepted the cargo *as fast as the mill will deliver it.* We are assured by the mill that it will use its best efforts to give you all possible despatch in the delivery of the cargo'' (Cross-Appellant's Brief 40).

Reliance is also placed by cross-appellant upon the assertion that ''it was at all times said that the vessel would be compelled to load at two ports, the first one of which was *Mukilteo''* (Cross-Appellant's Brief 41). Assuming this to be true, it would not aid the position of cross-appellant; for he never sent his vessel to Mukilteo, and she never left her birthplace within the period for which demurrage is claimed. On July 2nd the charterer had named two loading ports ''on a direct line to sea''. If the owner intended, or was ready, to set the laydays running, he could send his vessel to either of these ports. The case of *Mobile & Gulf Nav. Co. v. Sugar Products Co.,* 256 Fed. 392 (Brief p. 43), is not in point; for there the charterer did *not* inform the vessel of the loading port promptly, whereas here the vessel, if she had really been ready before October 13, ''*could* have proceeded without delay''. The same answer applies to the case of *The Silverstream* (Brief pp. 43, 44), as a reading of counsel's reference shows. The Scotch case, and the case in Lowell, discussed on pages 45-46 of the brief, is not a parallel case in any particular, as appears sufficiently from counsel's statement.

B. The owner's so-called ''notice of readiness'' was insufficient to start the laydays running. It was

given on August 13th and did not recite the fact that the vessel was then even ready to proceed to the loading place; it was a prediction that she would be ready to do so twelve days later. Impliedly it was a denial that she was ready to proceed to the loading place on the day when the notice was given. The record shows that important and necessary additions were made on the vessel after August 25th, and during the month of September and the first week of October (44, 129-132, 154). The windlass was admittedly not tested out on August 25th (133); when it was tested later the wild cat broke, and had to be renewed (159). The vessel was not seaworthy on August 25th; the notice of readiness would, therefore, not have been a true notice even if it had been given on August 25th. Apart from the fact that, on August 25th, she was 100 miles from the designated loading place, and voluntarily remained there until October 14th without any default of charterer, the notice of "readiness" would not have been a true notice even if she had then been at Port Angeles instead of Tacoma.

C. The vessel *was not detained at Tacoma by default of the charterers or their agents.* She remained in cross-appellant's own shipyard, under his exclusive control and in his exclusive possession. If she was a finished ship and ready to proceed on August 25th, she could have "proceeded direct in ballast to her loading port" at Port Angeles or Mukilteo and set the laydays running against the charterers by giving the proper notice at the loading port.

To "detain" is defined as "to hold back or restrain from proceeding"; "detention" is defined as "the act of detaining, confining or restraining" (New Standard Dictionary).

Far from holding the vessel back or restraining her from proceeding to the loading port, the charterers had invited her to proceed. The fact that the charterers joined with the invitation a reservation of what they conceived to be their legal rights did not constitute a restraint or detention. The wrongful "detention" upon which the owner's right to demurrage is predicated presupposes a delivery of the vessel to the charterers, and refers to a period of time subsequent to delivery to the chaterers. The charter-party clause cannot be applied to a period prior to such delivery.

ALLEGED WAIVER OF THE CONDITION PRECEDENT.

On pages 47-57 of his Brief, cross-appellant argues that, granting that he had committed a breach of a condition precedent (to proceed to the loading port), yet Hind, Rolph & Co. had *waived* the breach of this condition precedent. The argument is stated as follows:

> "Now in the case at bar Hind, Rolph & Company *certainly knew* that the 'Ostrander' did not go to Port Angeles on August 25th. They therefore waived the condition precedent" (Brief p. 51).

This seems to be the novel doctrine: If the first party to a contract knows that the second party has committed a breach of a condition precedent, the first

party thereby waives the performance of the condition precedent.

The mere statement of the doctrine is a sufficient refutation thereof. It is hardly necessary to say that the English case cited *(Bentsen v. Taylor,* Brief p. 47) does not lay down such a doctrine and that, if it did, this court would not follow it as an authority.

THE FUNDAMENTAL PRINCIPLES GOVERNING BOTH APPEALS.

Since the filing of Appellant's Opening Brief we have received the report of a case which went through the County Court, the Divisional Court, the Court of Appeal and the House of Lords of England and was finally decided in December, 1919. This case is the latest expression of the principles of law ruling the case at bar. The facts are strikingly similar; the fact that the delay occurred, in the English case, in connection with the discharge, while in the case at bar it occurred in connection with the loading, is immaterial.

The case referred to is **"The Lizzie"** *(Van Liewen v. Hollis Bros.,* 25 Com. Cas. 83 (House of Lords)).

The charter provided:

> (1) "the cargo to be loaded and discharged * * * as fast as the steamer can receive and deliver".
>
> (2) "should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at £25 per day."

A custom of the port was proved that it was the duty of the receivers of the cargo to have clear wharf space ready.

Owing to the congested state of the port when the vessel arrived, the discharge was not completed until eighteen days after the vessel's arrival, although it could have been completed in seven days, had there been clear wharf space and had the discharge proceeded at the vessel's maximum rate.

The owner brought an action for eleven days' demurrage.

Held: The words of the charter-party, and the proved custom of the port do *not* impose on the charterers an absolute and unqualified obligation to discharge the steamer in any fixed number of days; and as the charterers had done all that they reasonably could to discharge the steamer, and the delay which had taken place had been wholly due to circumstances over which the charterers had no control, the action failed.

The case was discussed, in the Court of Appeal, "subject to the question whether the 'Lizzie' was an '*arrived ship*' before October 6, when she was first in a position to discharge some of her cargo".

Thus, in the case at bar, the first question was:

"When was the 'Ostrander' an 'arrived ship', or first in a position to load some of her cargo?"

In the House of Lords Viscount Haldane said:

> "In such a case the liability of the charterer is treated as being only an obligation to take delivery with the utmost dispatch practicable, excluding affection by circumstances not under the control of the charterer. If a liability not qualified in this fashion is to be imposed, the language imposed must be definite on the point and free from ambiguity."

This judge, as well as the others, relied upon the previously decided House of Lord's case of *Hulthen v. Stewart* (1903), 9 Asp. 403. In that case it was agreed by the charter-party that the charterer should discharge the vessel's cargo "with customary steamship dispatch, *as fast as the steamer can deliver*"; but delivery was delayed by the crowded state of the dock. In discussing this case, Lord Dunedin said, in *"The Lizzie"*, 25 Com. Cas., p. 88:

> "The argument put forward, that the normal period of discharge could be expressed in terms of days and *then* constituted an absolute obligation, was rejected, it having been found as a fact that the charterers had done all that they reasonably could to discharge the vessel * * * The general proposition was laid down by Lord Macnaghten as follows: 'It is, I think, established that *in order to make a charterer unconditionally liable it is not enough to stipulate that the cargo is to be discharged 'with all dispatch', or 'as fast as the steamer can deliver', or to use expressions of that sort. In order to impose such a liability the language used must in plain and unambiguous terms define and specify the period of time within which delivery of the cargo is to be accomplished.*"

Finally Lord Atkinson expresses the same principle in the following words (p. 91):

> "If, by the terms of the charter-party, the charterers have agreed to discharge the chartered ship within a *fixed* period of time, that is an absolute and unconditional engagement for the non-performance of which they are answerable, whatever be the nature of the impediments which prevent them from performing it, and thereby cause the ship to be

detained in their service beyond the time stipulated."

"If no time be fixed expressly or impliedly by the charter-party, the law implies an agreement by the charterer *to discharge the cargo within a reasonable time, having regard to all the circumstances of the case as they actually exist,* including the custom or practice of the port, the facilities available thereat, and any impediments arising therefrom which the charterer could not have overcome by reasonable diligence."

In the instant case Judge Neterer found that,

(1) "The vessel was ready to receive cargo on October 15th * * *

(2) "It was the duty of respondents to furnish cargo *as fast as it could be loaded.* * * * "

(3) "Had cargo been furnished, the vessel *could have been loaded* by October 31st. * * * "

(4) "Libelant is entitled to demurrage from October 31st."

The judge, therefore, held the clause in the charter-party requiring the charterers to deliver cargo "as fast as it could be loaded" to be a clause imposing an *absolute duty,* for the non-performance of which charterers are made answerable, instead of holding, under the authorities, that the clause imposes merely a duty to furnish cargo within a reasonable time, having regard to all the circumstances.

The court, in deciding that no demurrage is due to the vessel for the period covered by the cross-appeal was clearly right.

The cross-appeal should be dismissed, with costs to cross-appellees.

Dated, San Francisco,
May 5, 1920.

Respectfully submitted,

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Proctors for Cross-Appellees.

No. 3426

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

HIND, ROLPH & COMPANY (a copartnership), and 1,727,783 feet of lumber loaded on board the schooner "LEVI W. OSTRANDER", and FIDELITY DEPOSIT COMPANY OF MARYLAND (a corporation),

Appellants and Cross-Appellees,

vs.

H. F. OSTRANDER,

Appellee and Cross-Appellant.

PETITION OF APPELLANTS FOR MODIFICATION OF DECISION AND JUDGMENT.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Kohl Building, San Francisco,
Proctors for Appellants and Petitioners.

No. 3426

IN THE

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Appellants and Cross-Appellees,

vs.

H. F. OSTRANDER,

Appellee and Cross-Appellant.

PETITION OF APPELLANTS FOR MODIFICATION OF DECISION AND JUDGMENT.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellants respectfully suggest that, by an oversight on the part of the Court, it has failed to render a decision of this cause in accordance with its own findings

of the facts and, in consequence of said oversight, has failed to modify the decree of the Court below by disallowing the demurrage awarded after November 30th.

The Court, in its opinion, states correctly:

> "The demurrage claimed by the appellee was $250 per day for three periods; first, from August 25 to October 13, 49 days; second, from October 13 to November 24, 27 days * * *; third, for 5 days after November 24."

The claim of the appellee extends, therefore, to and including November 30th.

The Court affirmed the decree of the Court below in denying demurrage from August 25 to October 13. Discarding this item, therefore, it appears that *the demurrage claimed by the appellee* was $250 per day for the second period of 27 days, and the third period of 5 days, making a total claim for *32 days.*

Apparently the Court overlooked the fact that, in awarding demurrage for *45 days,* the Court below had awarded demurrage for 13 days not claimed by appellee, and that its decree was, therefore, $3250 in excess of the damages claimed by the appellee.

The third period of 5 days is the period between November 24, when the schooner had completed loading, and November 30, when the appellee filed a libel for demurrage and attached the cargo.

If we read the opinion of the Court correctly, it was the intention of the Court to affirm the conclusions of the Court below in so far as they are co-extensive with appellee's claim for demurrage, but we think that the

Court overlooked the discrepancy between appellee's claim for demurrage, for 32 days, and the award of the Court below for 45 days. The 13 days in excess are within the period during which, as the Court has found, "*for other reasons* the schooner was detained until December 26, when she sailed from Port Angeles".

We are justified in presuming that, within the scope of "other reasons" referred to in its opinion, the Court intended to exclude the reasons previously mentioned, upon which appellants' liability is predicated, and to include reasons for which appellants are not responsible. These reasons were fully and, we believe, conclusively covered in the Brief for Appellants, pp. 40-58, where we showed that the claim for these 13 days was *waived by counsel in open Court* at the trial, because "*the cause of all the delay during December*" was that "*she was held by the War Trade Board*" (Mr. Ostrander's Testimony, Apostles 142-143).

Counsel for appellee stated in Court:

> "Our claim for delay consists of 5 days after November 24th, * * * but *we are making no claim for the subsequent time that the Government would not allow us to proceed.*" (Ap. p. 146.)

We bow to the decision of the Court holding appellants liable for the delay during the period from October 13 to November 24, when the vessel completed her loading, and even to November 30, when appellee filed the libel and attached the cargo; but we earnestly believe that the award of demurrage for 13 days beyond November 30 is plainly unjust, and that the Court

will correct an apparent oversight which is costly to appellants, and will modify its decision upon due consideration of this phase of the case.

Accordingly, we suggest and submit that the decision should be modified so that, instead of reading: "The decree is affirmed", it will read as follows:

> "Having found that the demurrage claimed by the appellee for 49 days was properly denied by the court below, and the demurrage claimed by the appellee for 32 days was properly awarded by said Court, the decree of the District Court is modified by decreasing the amount awarded thereby by $3250, making the award the total sum of $8000, and as so modified will stand affirmed."

Dated, San Francisco,
July 15, 1920.

Respectfully submitted,

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Proctors for Appellants and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and cross-appellee in the above-entitled cause and that in my judgment the foregoing petition for rehearing for modification of decision and judgment is well-founded in point of law, as well as fact, and that said petition is not interposed for delay.

Dated: San Francisco, Calif., July 22, 19[illegible].

[illegible]

Of counsel for appellant and cross-appellee.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellan
and cross-appellees in the above-entitled cause and
that in my judgment the foregoing petition of appells
for modification of decision and judgment is well-fou
in point of law, as well as fact, and that said petit
is not interposed for delay.

DATED: San Francisco, Cal., July 23, 1920.

LOUIS T. HENGSTLER

of counsel for appellants and
cross-appellees.

No. 3426

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

HIND, ROLPH & COMPANY (a copartnership), and 1,727,783 feet of lumber loaded on board the schooner "LEVI W. OSTRANDER", and FIDELITY DEPOSIT COMPANY OF MARYLAND (a corporation),

Appellants and Cross-Appellees,

vs.

H. F. OSTRANDER,

Appellee and Cross-Appellant.

APPELLANTS' PETITION FOR A REHEARING.

LOUIS T. HENGSTLER,
Kohl Building, San Francisco,
Proctor for Appellants and Petitioners.

No. 3426

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

HIND, ROLPH & COMPANY (a copartnership), and 1,727,783 feet of lumber loaded on board the schooner "LEVI W. OSTRANDER", and FIDELITY DEPOSIT COMPANY OF MARYLAND (a corporation),

Appellants and Cross-Appellees,

vs.

H. F. OSTRANDER,

Appellee and Cross-Appellant

APPELLANTS' PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The undersigned Proctor for appellants considers it his duty, in the interest of plain justice to his clients, to present to this Court the present petition for a rehearing of the cause. He believes that the failure of

his previous efforts to convince the Court that the decree exceeds the fair amount of damages recoverable by appellee by the sum of three thousand two hundred and fifty dollars ($3250), is due to his own shortcomings for which his clients should not be made to suffer, and he therefore earnestly appeals to the Court in the firm conviction that the Court, upon a reconsideration of the admitted facts of this case, will prevent the unjust consequences of the present decree by amending its decision in conformity with the prayer of the petition for a modification.

1. The evidence is:

(a) *Libelant's testimony:*

Mr. Ostrander, libelant and first witness called at the trial, testified on cross-examination:

> "Q. When did the vessel finally get away?
> A. On the 26th of December.
> Q. Not until the 26th of December? What was the cause of all the delay during December?
> A. She was held by the War Trade Board.
> Q. For what reason?
> A. An embargo had been placed on lumber and they would not permit her to sail in this trade.
> Q. So that she could not have sailed before that time without the license and permission of the United States Government?
> * * * * * * *
> A. No, the Government held her" (Ap. pp. 142, 143).

On redirect examination by Mr. Rupp, he testified as follows:

> "Mr. Rupp. * * * As I understand it, she was not allowed to proceed for some time because of the fact that the War Trade Board forbade her to

go to South Africa—would not give her a license to do so. They subsequently did so.

The WITNESS. Finally.

Q. In obtaining the license for her to do so, Hind Rolph & Company co-operated with you in that regard? A. Yes.

Q. When did the War Trade Board first announce a policy, or *put into effect* a policy of requiring licenses for boats to sail to South Africa, if you know?

A. I think it was some time in November.

Q. *Was it prior to November 24th?*

A. *I believe so''* (Ap. p. 145).

It therefore appeared at the beginning of the trial by libelant's personal testimony, that the delay of the vessel during December was caused by act of the Government and, indeed, that any delay subsequent to November 24th was due to the same cause.

(b) *Mr. Rupp's judicial admission:*

Under the circumstances it was eminently proper for the proctor for libelant to withdraw any claim for demurrage in excess of five days after November 24th. And, in fact, immediately after libelant had given this testimony, Mr. Rupp, in open Court and in the presence of the libelant, promptly and expressly withdrew any claim for any time subsequent to five days after November 24th, saying:

> "As a matter of fact, I think the only thing that could be said was that *we* did not get the boat away in time and that was the reason we were held, but *we have not made any claim for that delay. Our claim for delay consists of five days after November 24th,* which five days was consumed in this de-

> bate about the freight and the bill of lading, *but we are making no claim for the subsequent time* that the Government would not allow us to proceed" (Ap. p. 146).

On this delimitation of the issues the hearing of the case went on for four days; libelant called and examined his witnesses; respondents presented and closed their defence, and libelant called and finished the examination of many witnesses in rebuttal. During all this time respondents had relied upon the admission made in open Court by libelant, and the facts thereafter found by the lower Court and by this Court in the original opinion filed, viz, that

> "the demurrage claimed by the appellee was $250 per day for **three** periods; first, from August 25 to October 13, 49 days; second, from October 13 to November 24, 27 days (after deducting 13 lay days); third, for five days after November 24";

and that libelant was claiming no demurrage beyond the "third" period.

2. The "Decision" of the lower Court contains the following statements of libelant's claims:

> (a) "Libelant, as the owner, seeks to recover from the respondents $19,000 for demurrage for delay in furnishing cargo to the S. S. 'Levi W. Ostrander', *and the further sum of $1250 for five days' additional detention of said vessel.*"
>
> (b) "It is contended that the vessel could have completed loading in 13 working days, but that the respondents failed to furnish cargo to the vessel, so it was not finally loaded until November 24th; *that by the refusal of the respondents to pay demurrage the vessel was delayed five additional days.*"

There is not a word here of any "fourth" period, involving delay during December. As late as June 25, 1919,—four months after the trial—the lower Court therefore understood and stated in the opinion filed that the claim of libelant covered delay in furnishing cargo, down to November 24th, *plus* **five** *additional days.*

Nevertheless, when, on September 17, 1919, the decree was signed and filed in Seattle, the lower Court, instead of *five* additional days after November 24th or down to November 30th, awarded demurrage for **eighteen** additional days, or down to December 14th.

3. This was clear error and called loudly for a remedy. Respondents appealed to this Court from the whole decree, but emphasized the argument on periods "first", "second" and "third". The point involved in the "fourth" period is so obvious that a proper reference to the facts would seem sufficient to dispose of it inevitably; but we fear that our emphasis on the other points caused a corresponding failure to properly call the attention of the Court, in the first place, to this error, and that this defect in our argument is responsible for the fact that this Court has not adverted to this point in its opinion at all, and has probably entirely overlooked it.

4. After the decision of this Court was filed, and in response to our petition for a modification thereof, the Court has now modified its original findings of fact by adding to the three claims upon which the trial proceeded, a "fourth" claim, viz:

> "Fourth, for each day's detention after November 30, the date of filing the libel",

and has awarded to appellee, for demurrage during this "fourth" period, the sum of $3250.

It is respectfully submitted that the error in modifying the original finding of fact by making four claims out of libelant's three, is more grievous than was the error in decreeing the excessive demurrage on the original, correct finding that appellee has a claim for the three periods only.

5. The record shows Mr. Ropp's express withdrawal of this alleged "fourth" claim in only one place; but the attention of the Court is called to the fact that, at the end of the trial when Mr. Rupp attempted to repudiate his withdrawal, I said to the lower Court, in connection with my objection to the attempted repudiation:

> "I think Mr. Rupp stated half a dozen times that he did not ask for any more than five days of demurrage, and when I went into some of the facts, he said expressly that it was not necessary to do so, and that was the impression I got, that it was not necessary to do so, because he did not claim any demurrage during that period" (Ap. p. 417).

This statement was made in open Court and was not challenged. Although the record does not show it otherwise than indirectly by this final episode at the trial, Mr. Rupp did make the identical admission several times in the course of the trial.

6. Respondents made their defence in accordance with Counsel's express tender of the issues, viz: upon

claims for three periods and no more. Libelant himself having testified that any delay during December was not caused by respondents, it was eminently fair for his counsel to eliminate any issue of demurrage beyond November 30th by informing the Court, in the presence of libelant, that he made no claim such as this Court has now added as "fourth".

In writing its opinion in the original form, this Court must have been impressed with the propriety of this proceeding and the fact that the claim of libelant terminated on November 30; for the law is clearly that Mr. Rupp had a right to bind his clients by defining the amount due on the claim (Wilson v. Spring, 64 Ill. 14); to dismiss the action—if he had any—for damages beyond November 30 (McLaren v. McNamara, 55 Cal. 508); to stipulate as to the issues to be tried (J. L. Roper Lumber Co. v. Lumber Co., 49 S. E. 946); to waive a part of the relief which he might otherwise claim (Hoyt v. Gelson, 13 Johns 141); and on the other hand, I had a right to rely upon Mr. Rupp's admission made in the presence of the Court and his client, and to confine the defence of the action to the period ending with November 30th.

When admissions of this character are formally made, they are conclusive upon the client, and (particularly when as here, made in the presence of the client in open Court) cannot be withdrawn.

> "In the trial of a cause the admissions of Counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise

> be called. They may limit the demand made * * *. Indeed, any fact, bearing upon the issues involved admitted by counsel, may be the ground of the Court's procedure equally as if established by the clearest proof. And if in the progress of a trial, either by such admission or proof, a fact is developed which must necessarily put an end to the action, the Court may * * * act upon it and close the case."
>
> Oscanyan v. Arms Co., 103 U. S. 261, *263*.

Here the case for any demurrage beyond November 30th was closed on the first day of the trial.

> "It would operate as a fraud upon the adverse party, if, after he had been thus induced to withhold necessary proofs, he should be compelled to prove the facts which had been admitted, or to submit to defeat."
>
> Jones on Evidence, Section 257.

When Mr. Rupp, during the last moments of the trial, after having at the beginning defined the issues and eliminated any "fourth" claim, surprised respondents by attempting to retract his judicial admission, the grounds of my objection were that,

> "when I went into some of the facts, he said expressly that it was not necessary to do so * * * because he did not claim any demurrage during that period. For that reason, in one or two instances, I desisted from going on with further testimony during that period, because I relied on the fact that five days was all that was claimed under the libel" (Ap. p. 417).

It is respectfully submitted that libelant was estopped from making a retraction of his admissions after respondents had relied upon them in presenting their de-

fence to the Court. In our opinion the Court itself would not then have had the power to give him leave to withdraw his admission; at any rate, no such leave was in fact granted. The libelant, the respondents and the Court were and are bound by the issues solemnly defined.

7. For the reasons stated I am constrained by my duty to my clients to insist respectfully and earnestly that the addition to the former opinion of this Court of a claim "fourth, for each day's detention after November 30, the date of filing the libel", is contrary to the admitted facts. The statement in the original opinion, that "the demurrage claimed by the appellee was $250 per day for **three** periods" is correct; the amended statement that the demurrage claimed by the appellee was "for **four** periods" is erroneous. The demands of justice in this case do not require a change in the facts; they require that the Court should award demurrage to libelant in accordance with the issues limited by libelant himself, and properly defined in the original opinion of the Court below and in the findings of this Court. Any other action would permit a legal fraud upon respondents who were not required to make, but were precluded from making a defence to the alleged "fourth" claim for 13 days.

8. I have an abiding confidence that this Court, after reconsideration of the matters here urged, will relieve respondents from the obligation to pay damages for the 13 days in question. But if the Court should decide that

the award for these 13 days demurrage shall stand, then and in that event the Court is respectfully requested to vouchsafe a finding as to the cause of the delay during the 13 days in question, for the following reasons: The record certainly shows that respondents personally were in no wise at fault in the entire transaction, but that others, viz., the Douglas Fir Exploitation & Transport Company, or The Puget Sound Mills & Timber Company, or the Charles Nelson Company, are the parties who should be ultimately responsible to respondents for any damages which they may be required to pay to libelant for demurrage. Respondents, however, have no means of attaching the responsibility for the 13 days to the proper party, unless the Court—if respondents' petition be denied—advise the parties to this action of the definite ground upon which the decision referring to the alleged "fourth" period is based.

Dated, San Francisco,
September 7, 1920.

Respectfully submitted,

Louis T. Hengstler,
Proctor for Appellants and Petitioners.

Certificate of Counsel.

I hereby certify that I am counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is

well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
September 7, 1920.

LOUIS T. HENGSTLER,
Counsel for Appellants
and Petitioners.

No. 3427

United States
Circuit Court of Appeals
For the Ninth Circuit.

PABST BREWING COMPANY, a Corporation,
Plaintiff in Error,

vs.

E. CLEMENS HORST COMPANY, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Northern Division of the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Superior Court of the County of Sacramento, State of California.

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

vs.

PABST BREWING COMPANY, a Corporation,
Defendant.

Complaint.

The plaintiff in the above-entitled action complains of the defendant herein and for cause of action alleges:

1. Plaintiff now is and during all the times mentioned was a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of New Jersey and doing business as such corporation in the State of California.

2. Defendant now is and during all the times mentioned was a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Wisconsin but doing business as such corporation in the State of California.

3. In the month of August, 1911, and by virtue of certain contracts in writing made and entered into between plaintiff and defendant for the price of twenty cents ($.20) per pound, F. O. B. cars in the State of California, plaintiff agreed to sell and deliver to defendant and defendant agreed to purchase, pay for and receive from plaintiff two thousand (2,000) bales of Cosumnes hops to be grown in the State of California during the year 1912, containing

in the aggregate approximately two hundred (200) tons of hops aforesaid; delivery of said hops to be made after the curing of said crop of 1912 and prior to the first day of March, 1913.

4. That thereafter in the year 1912 plaintiff did procure said two thousand bales of Cosumnes hops of the said crop of 1912 in accordance with the terms and provisions of said contract and [4*] agreement with defendant, and in full the provisions thereof did offer and did tender the same to defendant;

That, however, defendant refused to accept, receive or pay for said hops or any thereof.

5. Plaintiff duly performed and offered to perform all the acts, conditions and things on its part to be performed in accordance with said contract and agreement for said sale of hops aforesaid but defendant neglected and refused to do or perform the conditions on its part to be performed as aforesaid.

6. By said failure and refusal on the part of defendant to accept, receive and pay for said hops as aforesaid plaintiff has been damaged in the sum of Thirty-two Thousand ($32,000.00) Dollars.

WHEREFORE plaintiff prays judgment of the Court against defendant in the sum of $32,000.00 and costs of suit.

DEVLIN & DEVLIN, and
W. H. CARLIN,
Attorneys for Plaintiff. [5]

[Duly verified.]

[Endorsed]: Filed Aug. 4, 1913. [6]

*Page-number appearing at foot of page of original certified Transcript of Record.

[Title of Court and Cause.]

Answer (and Counterclaim).

The defendant in the above-entitled action makes answer to the complaint of the plaintiff in the above-entitled action as follows:

FIRST.

For a first defense, defendant denies and alleges as hereinafter mentioned:

I.

Defendant denies that in the month of August, 1911, or at any time, any contracts in writing, or at all, were made and entered into between the plaintiff and defendant in manner and form as alleged in paragraph 3 of the complaint, but on the contrary, defendant alleges that in the month of August, 1911, at the City and County of San Francisco, State of California, the plaintiff caused a telegram to be transmitted to the defendant from the said City and County of San Francisco, to the defendant in the City of Milwaukee, State of Wisconsin, whereby plaintiff offered to sell to the defendant one thousand bales of Choice Cosumnes air dried hops of the crop of 1912, at the price of twenty cents a pound f. o. b. cars in the State of California, [7] and defendant, by telegram transmitted by the defendant from Milwaukee aforesaid to the plaintiff at the City and County of San Francisco aforesaid, accepted the said offer; that no time for the delivery of the said one thousand bales of hops and no time for the payment of the purchase price of said hops was proposed or fixed by the said telegraphic offer or by the said tele-

graphic acceptance; that thereafter, in the same month, the plaintiff, at San Francisco aforesaid, transmitted another telegram to the defendant at Milwaukee aforesaid, whereby the plaintiff offered to sell to the defendant an additional one thousand bales of choice air-dried Cosumnes hops, to be delivered by the plaintiff to the defendant at Milwaukee aforesaid, at the price of twenty cents a pound plus freight thereon from the Pacific Coast, and thereafter in the said month of August, 1911, the defendant, by telegram sent by the defendant from Milwaukee aforesaid to the plaintiff at San Francisco aforesaid, accepted the said last-mentioned offer; that no time for the delivery of the said last-mentioned hops and no time for the payment of the purchase price thereof was proposed or fixed in the last-mentioned telegraphic offer and acceptance thereof.

That thereafter, in the month of September, 1911, the plaintiff presented to the defendant, at Milwaukee aforesaid, a proposed form of written and printed contract relating to the hops mentioned in the said telegraphic offers and acceptances providing in substance that the time of shipment and delivery of the said hops should be during the months, inclusive, of September to December, meaning the months of September to December, 1912, and also containing many printed clauses and conditions in relation to the proposed sale and delivery of the said [8] hops, which clauses and conditions had not been discussed or referred to in the said telegraphic offer and acceptance, and defendant refused to sign the said proposed contract and did not sign the same, but im-

mediately thereafter and in the said month of September, 1911, the defendant in writing informed the plaintiff that defendant's understanding of any contract between the plaintiff and defendant in relation to the said hops was that shipments and deliveries of the said hops should be made by the plaintiff to defendant during the months of October, November and December of 1912 and January and February of 1913, and that samples of any hops which the plaintiff should offer for delivery to defendant in pursuance of the aforesaid telegraphic offers and acceptances, should and must be submitted by plaintiff to the defendant and be approved by the defendant before shipments and deliveries should be made; that the plaintiff accepted and agreed to defendant's interpretation and understanding of the said telegraphic offers and acceptances, and thereafter, in the months of September and October, 1912, the plaintiff submitted and offered to defendant, for its approval, before shipment, samples of hops which plaintiff claimed were choice Cosumnes hops of the crop of 1912; that the said samples were not choice Cosumnes hops, but were hops of poor and inferior quality, and defendant refused to approve the same.

That thereafter, in the month of October, 1912, the plaintiff in writing offered the defendant to modify any contract which might have been entered into between the plaintiff and defendant by the telegraphic offers and acceptances as aforesaid, in the following respect, that is to say: the plaintiff in writing offered defendant that if defendant would submit to [9] the plaintiff samples of choice Cosumnes hops grown

in the State of California in the year 1912, of such character and quality as the defendant would be willing to accept, the plaintiff would procure and sell and deliver to the defendant two thousand bales of choice Cosumnes hops equal in all respects to the samples so to be presented and submitted by the defendant to the plaintiff; that the defendant accepted the last-mentioned offer and did in accordance with said acceptance present and submit to the plaintiff samples of choice Cosumnes hops which it had procured elsewhere, and informed plaintiff in writing that it would be willing to accept and purchase and pay for two thousand bales of choice Cosumnes hops from the defendant if the same were in all things equal in quality to the samples so submitted by defendant to plaintiff; that the plaintiff never did procure or offer or deliver to the defendant any choice Cosumnes hops or any hops equal in quality to the samples submitted by defendant to plaintiff as aforesaid, and has never at any time delivered or offered to deliver any choice Cosumnes hops of the crop of 1912, or any hops of the crop of 1912.

II.

That the only contract or contracts ever made between the plaintiff and defendant in relation to the two thousand bales of Cosumnes hops mentioned in the plaintiff's complaint is and are the offers and acceptances mentioned in paragraph I of this defense as modified as in said paragraph I of this defense alleged.

III.

Defendant denies that thereafter, in the year 1912,

or at any time, the plaintiff offered or tendered two thousand [10] bales of Cosumnes hops of the crop of 1912, or any hops, to defendant; and defendant has no knowledge or information upon the subject sufficient to form a belief as to the allegation that in the year 1912 plaintiff did procure said two thousand bales of Cosumnes hops of the said crop of 1912, and placing its denial upon that ground, defendant denies the last-mentioned allegation; and defendant alleges that if the plaintiff did procure two thousand bales of Cosumnes hops of the crop of 1912, the same were not procured in accordance with the terms or provisions of any contract or agreement with the defendant.

IV.

Defendant denies that the plaintiff performed or offered to perform all or any acts, conditions or things on its part to be performed in accordance with any contract or agreement with the defendant, and denies that defendant neglected or refused to do and perform any conditions on its part.

V.

Defendant denies that by any failure or refusal on the part of defendant to accept, receive or pay for any hops mentioned in the complaint, the plaintiff has been damaged in the sum of Thirty-two Thousand (32,000) Dollars, or at all.

SECOND.

Defendant by way of counterclaim and cause of action against the plaintiff, alleges:

I.

Defendant at all the times mentioned herein was

and now is a corporation organized and existing under the laws of the [11] State of Wisconsin, and plaintiff at all the times mentioned herein was and it now is a corporation organized and existing under the laws of the State of New Jersey.

II.

Between the month of August, 1911, and the month of October, 1912, the plaintiff contracted and agreed with defendant that if defendant would procure and submit to the plaintiff samples of choice Cosumnes hops grown in the State of California in the year 1912, the plaintiff would sell and deliver to the defendant two thousand bales of choice Cosumnes hops grown in the State of California in the year 1912 equal in all respects to the samples so to be presented and submitted by the defendant to plaintiff, and that plaintiff would deliver the said two thousand bales of hops to the defendant, f. o. b. cars in the State of California at the price of twenty cents a pound; that thereupon defendant did procure and submit to the plaintiff samples of choice Cosumnes hops grown in the State of California in the year 1912, and requested and demanded of the plaintiff that plaintiff deliver to the defendant two thousand bales of Cosumnes hops grown in the State of California in the year 1912 equal in all respects to the samples so presented and submitted, but plaintiff broke its said contract and failed and refused to deliver the same to defendant and did not at any time deliver to plaintiff two thousand bales of Cosumnes hops grown in the State of California in the year 1912 equal in all respects or in any respect to the

samples so submitted as aforesaid, and did not deliver the same, or any hops, to defendant on cars in the State of California, or at any place, or at all. [12]

III.

By reason of plaintiff's breach of the said contract defendant has been damaged in the sum of Twenty-five Hundred (2500) Dollars.

WHEREFORE, this defendant prays judgment against plaintiff:

1. That plaintiff take nothing by his said action against the defendant;

2. That the defendant recover against the plaintiff its damages in the sum of Twenty-five Hundred (2500) Dollars;

3. That the defendant recover its costs against the plaintiff.

HELLER, POWERS & EHRMAN,
Attorneys for Defendant. [13]

[Duly verified.]

[Endorsed]: Filed Sep. 23, 1913. [14]

[Title of Court and Cause.]

Answer to Counterclaim.

Comes now the plaintiff in the above-entitled action, and answering the alleged counterclaim and cause of action set forth by the defendant in said action, in its answer to the complaint of the plaintiff therein, denies and avers as follows:

I.

Denies that between the month of August, 1911, and the month of October, 1912, or at any other time, the plaintiff contracted and agreed, or contracted or agreed, with defendant that if defendant would procure and submit, or procure or submit, to plaintiff, samples of choice Cosumnes hops or any hops grown in the State of California or elsewhere, in the year 1912, or at any other time, the plaintiff would sell and deliver, or sell or deliver, to the defendant two thousand (2,000) bales of choice Cosumnes hops or any hops grown in the State of California or elsewhere, in the year 1912, or at any other time, equal in all respects to any samples to be presented or submitted by defendant to plaintiff, and denies that at said time, or at any other time, plaintiff contracted or agreed with defendant that it would deliver the said [15] two thousand (2,000) bales of hops, or any bales of hops, to the defendant f. o. b. cars in the State of California, or elsewhere, at the price of twenty cents (20¢) per pound or any other price. Admits that during the year 1912 defendant did submit to plaintiff samples of certain hops, but denies that said defendant requested and demanded, or requested or demanded, of plaintiff that plaintiff deliver to defendant two thousand (2,000) bales of Cosumnes hops or any hops grown in the State of California or elsewhere, in the year 1912, equal in all or any respects to samples presented and submitted by defendant to plaintiff, and in that connection plaintiff denies that it ever at any time entered into any contract with regard to any hops, with defend-

ant, save and except the contract declared upon and alleged in its complaint herein, and further alleges that during the year 1912, plaintiff proposed and offered to sell to defendant two thousand (2,000) bales of hops equal in all respects to the said samples so presented and submitted to it by defendant, and that defendant rejected said offer and proposal, and that the same was not accepted by defendant, and that no contract or agreement with regard thereto was made or consummated between plaintiff and defendant. Denies that plaintiff broke any contract whatsoever between it and defendant, and denies that it refused at any time to deliver any hops to defendant.

II.

Denies that by reason of plaintiff's breach of any contract between plaintiff and defendant, defendant has been damaged in the sum of Twenty-five Hundred Dollars ($2,500.00) or in any sum whatsoever.

WHEREFORE, plaintiff prays that the prayer of defendant's [16] answer be denied, and that it have judgment as prayed for in its original complaint herein.

W. H. CARLIN,
DEVLIN & DEVLIN,
WM. H. DEVLIN,
Attorneys for Plaintiff. [17]

[Duly verified.]

[Endorsed]: Filed Dec. 1, 1913. [18]

At a stated term, to wit, the April term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City of Sacramento, on Thursday, the 16th day of April, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,678.

E. CLEMENS HORST CO.

vs.

PABST BREWING CO.

* * * * * * * * *

Order Granting Leave to File Amendments to Complaint.

Upon motion of Mr. Devlin, it was ordered that plaintiff be and it is hereby granted leave to file amendments to complaint herein.

* * * * * * * * *

[19]

[Title of Court and Cause.]

Amendments to Complaint.

The above-named plaintiff, by leave of Court first had and obtained, files the following amendments to its complaint:

I.

After the word "of," in line 25 of page 1, add the following:

"choice, air-dried."

II.

After the word "of" where it first occurs, in line 31 of page 1, add the following:

"choice, air-dried."

III.

Strike out commencing with the word "cars," in line 22 of page 1, and ending with the word "California," in line 22 of same page, and in lieu thereof insert "cars in Milwaukee, Wisconsin, plus freight."

IV.

After the word "and," in line 28 of page 1, insert "on or." [20]

V.

Strike out the word "first," in line 28 of page 1, and in lieu thereof insert "twenty-eight."

VI.

After the word "of," in line 24 of page 1, insert "choice air-dried."

VII.

Strike out the word "full," in line 1 of page 2, and insert "fulfillment thereof."

VIII.

After the word "thereof," in line 4 of page 2, add the following:

"That during the month of November, 1912, the said defendant, in writing, notified the plaintiff that it renounced and repudiated the said

contract, and did not, at any time, withdraw the same."

Dated April 16th, 1914.

W. H. CARLIN and
DEVLIN & DEVLIN,
Attorneys for Plaintiff. [21]

[Duly verified.]

[Endorsed]: Filed April 16th, 1914. [22]

At a stated term, to wit, the April term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City of Sacramento, on Tuesday, the 21st day of April, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,678.

E. CLEMENS HORST CO.

vs.

PABST BREWING CO.

Order Granting Leave to File Amended Complaint.

* * * * * * * * *

On motion of Mr. Devlin, it was ordered that plaintiff be and he is hereby allowed to file an amended complaint.

* * * * * * * * [23]

[Title of Court and Cause.]

Amended Complaint.

Comes now the plaintiff by leave of the Court first had and obtained, and amends the complaint by amending the prayer thereof so as to read as follows:

WHEREFORE, plaintiff prays judgment of the Court against defendant in the sum of Thirty-two Thousand Dollars ($32,000.00), and interest thereon at the rate of seven per cent per annum from the first day of March, 1913, to entry of judgment, and also for its costs of suit and such other further or different relief as may be meet and proper.

DEVLIN & DEVLIN,
Attorneys for Plaintiff.

[Endorsed]: Filed April 21st, 1914. [24]

[Title of Court and Cause.]

Waiver of Jury.

It is hereby stipulated and agreed that a jury be and is hereby waived in the trial of the above cause.

DEVLIN & DEVLIN,
W. H. CARLIN,
Attys. for Ptff.
HELLER, POWERS & EHRMAN,
Attys. for Deft.
THOS. J. GEARY.

It is so ordered.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Jun. 6, 1918. [25]

[Title of Court and Cause.]

Amendments to Complaint.

Comes now the above-named plaintiff by leave of the Court first had and obtained, and amends its complaint herein by adding to said complaint immediately before the prayer thereof the following:

"That a bale of hops consists of two hundred (200) pounds. That the freight from San Francisco to Milwaukee on the hops hereinabove mentioned in the month of August, 1911, and continuously thereafter down to and including the date of the filing of the complaint herein was two cents (2¢) per pound. That on the 4th day of November, 1912, and thereabouts, and continuously thereafter down to and including the commencement of this action, the market price or market value of said hops at Milwaukee aforesaid was fourteen cents (14¢) per pound. That by reason of the failure and refusal of said defendant to accept, receive and pay for said hops, as aforesaid, the said plaintiff has sustained damages in the difference between the market price or value of said hops at Milwaukee at the time of [29] said breach, and the contract price thereof in the sum of eight cents (8¢) per pound, or a total of Thirty-two Thousand Dollars ($32,000.00) and interest on said sum at the rate of seven (7) per cent per annum from the time of said breach to the date of the entry of judgment herein, no part of which has been paid,

but all of which remains owing, due and unpaid."

And also amends the prayer of said complaint, so that the same shall read as follows:

"WHEREFORE, plaintiff prays judgment of the Court against defendant in the sum of Thirty-two Thousand Dollars ($32,000.00), and interest thereon at the rate of seven (7) per cent per annum from the time of said breach to the date of the entry of judgment herein, and also for its costs of suit and for general relief and for such other relief as may be meet and proper."

DEVLIN & DEVLIN,
W. H. CARLIN,
M. E. HARRISON,
Attorneys for Plaintiff.

[Endorsement]: Filed June 12, 1918. [30]

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

A jury having been expressly waived by the parties in writing, by stipulation duly filed with the clerk, and the cause having heretofore been tried by the Court, sitting without a jury, and evidence having been received by the Court on behalf of the respective parties, and the cause having been argued by the respective counsel, and submitted to the Court for decision, the Court does now make, enter and file its findings of fact and conclusions of law as follows, to wit:

FINDINGS OF FACT:

I.

That the plaintiff is, and during all of the times mentioned in the complaint was, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of New Jersey, and doing business, as such corporation, in the State of California.

II.

That the defendant is, and during all of the times mentioned in [34] the complaint was, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Wisconsin, and doing business, as such corporation, in the State of California.

III.

That during the month of August, 1911, by virtue of certain contracts in writing, made and entered into between plaintiff and defendant, the plaintiff agreed to sell and deliver to defendant, and defendant agreed to purchase, pay for and receive from plaintiff, two thousand (2,000) bales of choice, air-dried Cosumnes hops, to be grown in the State of California during the year 1912, delivery to be made after the curing of said crop of 1912, and on or prior to the 28th day of March, 1913, for the price of twenty cents per pound, f. o. b. cars at Milwaukee, Wisconsin, plus the freight, that is: Freight from San Francisco, or California points to Milwaukee was to be paid by the defendant in addition to the purchase price named. That the freight from San Francisco and all California points to Milwaukee on

the hops herein mentioned was, in August, 1911, and continuously thereafter down to and including the date of the filing of the complaint herein, two cents per pound. That the said contract did not, by its terms, require plaintiff to submit samples for hops prior to delivery, but the parties so construed it, and it thereafter became one of the terms of the contract, by which they were bound. The said contract was, in no other respect, modified or changed by the subsequent correspondence or negotiations or other act of the parties.

IV.

That plaintiff, within the time provided by the contract, and before November 4th, 1912, and after the curing of the crop of said hops in 1912, submitted to the defendant samples of the hops of that season's growth, and represented itself as ready to deliver the quantity therein specified, to the defendant. The samples so submitted [35] represented hops of the character and quality as called for by the contract, and plaintiff was ready, able and willing to deliver the quantity specified by the contract to the defendant. The samples thus submitted were each and all rejected by the defendant, who claimed the same did not represent the quality of hops which it was entitled to under the aforesaid contract. Thereafter, on November 4th, 1912, defendant notified plaintiff in writing that it cancelled and repudiated the contract, and did not, at any time, withdraw the same, and refused to accept delivery of the hops, or any of them, tendered by plaintiff. The samples submitted by plaintiff were hops of the quality speci-

fied in the contract. Plaintiff, prior to the submission of said samples, procured and was at the time said samples were submitted and down to November 4th, 1912, and thereafter, ready, able and willing to deliver the quantity of hops of the quality specified and called for, in accordance with the terms of the contract.

V.

That a bale of said hops, as specified in said contract, does not contain two hundred pounds, but contains net one hundred and eighty-five (185) pounds, and two thousand (2,000) bales of said hops, the amount in said contract specified, contains three hundred and seventy thousand (370,000) pounds.

VI.

That plaintiff duly performed, and offered to perform, all of the acts, conditions and things on its part to be done and performed, in accordance with its contract and said agreement for the sale of said hops, but defendant refused to accept or receive the same, or any part thereof. That said hops had a market price at Milwaukee, Wisconsin, on November 4th, 1912, and at all the times mentioned in the complaint.

VII.

That the difference between the contract price and the market price of said hops at Milwaukee, Wisconsin, on November 4th, 1912, the [36] time that the defendant canceled the contract and refused to accept the said hops, as tendered by said plaintiff to said defendant, was six cents (6¢) per pound. That plaintiff has sustained damages in the difference between the contract price of said hops and the market

price, or market value thereof, at Milwaukee, Wisconsin, as it existed on November 4th, 1912, in the sum of Twenty-two Thousand Two Hundred Dollars ($22,200.00), and also in an additional sum for interest on said amount from the 4th day of November, 1912, down to and including the entry of judgment herein, at the rate of six per cent (6%) per annum. That said interest is to be added to the said sum of Twenty-two Thousand Two Hundred Dollars ($22,200.00), as the full amount of damages sustained by plaintiff.

VIII.

That no part of said damages has been paid.

IX.

That the allegations contained in paragraph I of defendant's counterclaim, or cause of action, against the plaintiff are true.

X.

That the allegations contained in paragraph II of said counterclaim, or cause of action, are untrue.

XI.

That the allegations contained in paragraph III of said defendant's counterclaim, or cause of action, against the plaintiff are untrue.

CONCLUSIONS OF LAW.

As conclusions of law, the Court finds that plaintiff is entitled to recover judgment against the defendant for:

I.

The principal sum of Twenty-two Thousand Two Hundred Dollars [37] ($22,200.00).

II.

Interest on said sum at the rate of six per cent (6%) per annum from the 4th day of November, 1912, down to the date of the entry of the judgment herein, as a part of said damages, to be added to said sum of Twenty-two Thousand Two Hundred Dollars ($22,200.00).

III.

Its costs of suit.

IV.

That the defendant take nothing by its counterclaim.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: February 13th, 1919.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed Feb. 13, 1919. [38]

In the Northern Division of the United States District Court for the Northern District of California, Second Division.

No. 38—LAW.

E. CLEMENS HORST COMPANY, a Corporation,

vs.

PABST BREWING COMPANY, a Corporation.

Judgment.

This cause having heretofore been tried by the Court, sitting without a jury, a jury having been ex-

pressly waived by the parties in writing, by stipulation duly filed with the clerk herein, and evidence having been received by the Court, on behalf of the respective parties, and the cause having been argued by the respective counsel, and submitted to the Court for decision;

And the Court having made its findings of fact and conclusions of law, and directing that judgment be entered in accordance therewith;

Now, in consideration of the premises and of the law, IT IS BY THE COURT ORDERED, ADJUDGED AND DECREED:

I.

That plaintiff do have and recover from the defendant the sum of Twenty-two Thousand Two Hundred Dollars ($22,200.00), and also the additional sum of Eight Thousand Three Hundred Fifty-seven 68/100 Dollars ($8,357.68), as interest on said sum of Twenty-two Thousand Two Hundred Dollars ($22,200.00), at the rate of six per cent (6%) per annum from the 4th day of November, 1912, to this date, being the total sum of Thirty Thousand Five Hundred and Fifty-seven 68/100 Dollars ($30,557.68), which said total sum of Thirty Thousand Five Hundred and Fifty-seven 68/100 Dollars ($30,557.68) the said plaintiff shall have and recover from defendant. [39]

II.

That the defendant take nothing by its counterclaim herein, and that plaintiff have and recover from the defendant its costs of suit, taxed at the sum of Three Hundred and Forty-five (345) Dollars.

Entered this 13th day of February, A. D. 1919.
WALTER B. MALING,
Clerk.
By Thomas J. Franklin,
Deputy Clerk.

(Entered in Vol. 1, Judgments and Decrees, at page 198.) [40]

[Title of Court and Cause.]

Bill of Exceptions.

BE IT REMEMBERED, that on the 6th day of June, 1918, the above-entitled action went on for trial in the above-entitled court before the Honorable William C. Van Fleet, presiding, sitting without a jury, the jury having been waived in writing, Messrs. Devlin & Devlin and M. E. Harrison, Esq., appearing as attorneys for plaintiff, and Messrs. Heller, Powers & Ehrman appearing as attorneys for defendant, with T. J. Geary, Esq., of counsel.

Thereupon, the following proceedings were had and testimony introduced, and the same constitutes all the testimony given at said trial.

It was stipulated that plaintiff and defendant were both corporations. It was also admitted that the freight rate at the time in question was established by the Inter-State Commerce Commission at 2¢ per pound from Sacramento to various places in question throughout the Eastern States outside of the State of California.

Thereupon, Mr. Devlin introduced the following letters and telegrams: [48]

E. CLEMENS HORST COMPANY,
First National Bank Building,
Chicago.

August 24th, 1911.

Pabst Brewing Company,
Milwaukee, Wis.

Gentlemen:—

In reply to your inquiry, we make firm offer of 500 bales 1911 crop "air-dried" Cosumnes at 40 cents, delivered in Milwaukee. Shipment between August and December, 1911, at your option.

This offer is made subject to sufficient extension in time for shipments and *or* deliveries to cover any and all delays arising from extraordinary conditions beyond seller's control.

Terms net cash upon receipt of hops.

Yours truly,
E. CLEMENS HORST COMPANY.
By G. S. C. [49]

COPY.

San Francisco, August 21, 1911.

Pabst Brewing Co.,
Milwaukee, Wis.

We offer you for immediate or later shipment subject to your telegraphic acceptance tomorrow and our confirmation of sale one thousand bales new crop choice brewing air dried coast hops at forty cents plus freight account heavy buying for England and

other foreign countries our market is active and advancing fast.

E. CLEMENS HORST CO.

COPY.

Milwaukee, Wis., August 22, 1911.

E. Clemens Horst Co.,
San Francisco.

Provided section from which you propose furnishing satisfactory offer forty cents Milwaukee five hundred bales strictly choice deliver.

PABST BRG. CO. [50]

DAY LETTER.

S. F. Aug. 24/11.

Pabst Brewing Co.,
Milwaukee, Wisc.

We confirm sale five hundred bales air-dried Cosumnes elevens at forty cents delivered for shipment August December inclusive period we offer thousand air-dried Cosumnes Twelves at Twenty plus freight period please wire when interested more elevens.

E. CLEMENS HORST CO.

Charge E. C. Horst Co.
W. U. T. Co.

TELEGRAM.

Copy.

Milwaukee, Wis., August 25, 1911.

E. Clemens Horst Co.,
San Francisco, Cal.

Will take thousand bales Cosumnes twelves strictly choice quality twenty cents fob milwaukee.

PABST BREWING CO.

330 P. M. [51]

NIGHT LETTERGRAM.

San Francisco, August 25, 1911.

Pabst Brewing Co.,

Milwaukee, Wis.

We offer one thousand bales twelve choice air dried Cosumnes delivered Milwaukee at twenty cents plus freight this is positively best we can do we expect twelves to run about thirty cents coast period referring our todays telegram please rush guarantee to bank here and also please telegraph bank guaranteeing payment our drafts against warehouse receipts or ladings for sixty eight and two fifths cents bushel on two hundred thousand contract August fifteenth also seventy nine and one fifth cents bushel on fifty thousand chevelier also eighty one cents bushel on ten thousand moravian.

E. CLEMENS HORST CO.

Charge ECH. Co.

DAY LETTER.

Milwaukee, Wis. Aug. 26, 11.

To E. C. Horst Co.

San Francisco, Cal.

We accept offer one thousand bales choice cosumnes air dried nineteen twelve crop twenty cents fob period have wired bank California guaranteeing your drafts on us as requested period all drafts so far paid by us have only warehouse receipts attached how about the hundred thousand shipments you agreed to make this month we need the barley answer.

PABST BREWING CO. [52]

TELEGRAM.

San Francisco, August 29, 1911.

2 a

Pabst Brewing Co.,
Milwaukee, Wis.

We confirm sale to you of another one thousand bales choice nineteen twelve crop cosmunes at twenty cents delivered Milwaukee plus freight charges making total sales to you of nineteen twelve crop two thousand bales what is best price you will entertain on five or thousand bales same quality eleven crop.

E. CLEMENS HORST CO.

TELEGRAM.

Milwaukee, Wis. August 28, 1911.

E. CLEMENS HORST CO.
SAN FRANCISCO.

We accept your offer one thousand bales strictly choice Cosmunes nineteen twelve crop at twenty cents f o b please confirm.

PABST BREWING CO.

222 P. M. [53]

NIGHT LETTERGRAM.

San Francisco, August 27, 1911.

Pabst Brewing Co.,
Milwaukee, Wis.

We confirm sale to you of one thousand bales nineteen twelve crop choice air dried cosumnes delivered at Milwaukee at twenty cents plus freight from Coast period This in accordance with out telegraphic offer of the twenty fifth period. Offer you additional thousand bales at same price also offer you subject

our confirmation of sale of sale additional thousand bales eleven crop at forty cents delivered at Milwaukee freight paid period. Our offer on twelve crop from your stand point is exceptionally low one period As our sales of twelve crop increase will increase price accordingly only able to make you this low offer because of our unsold surplus.

E. CLEMENS HORST CO.

Charge E. C. H. Co. [54]

Sept. 1st, 1911.

In reply refer to S–39796.

Pabst Brewing Co.,
Milwaukee, Wis.

Gentlemen:—

We have just discovered that we inadvertently overlooked confirming our night lettergram to you of August 29th, as follows:

> "We confirm sale to you of another one thousand bales choice nineteen twelve crop Cosumnes at twenty cents delivered Milwaukee plus freight charges making total sales to you of nineteen twelve crop two thousand bales. What is best price you will entertain on five hundred or thousand bales same quality eleven crop."

We feel satisfied that both of your contracts for 1912 crop Hops at 20¢ plus freight from the Coast will prove a most profitable investment to you, and we assure you that your order is appreciated and will receive our most careful attention.

Your faithfully,
E. CLEMENS HORST CO.,

TBS/J.

NIGHT LETTERGRAM.

San Francisco, Sept. 27, 1912.

Pabst Brewing Co.,
Milwaukee, Wis.

Mr. George wires us you are now negotiating resale to other dealers of the two thousand bales Cosumnes we sold you and that you wish all these Hops held on Coast until you order hops forwarded period. We are willing hold these hops on coast if you accept deliveries now on coast less freight allowance period we are willing resell the two thousand bales for your account or we are willing to exchange all or part for nineteen twelve Oregons or Yakimas at difference in price or we are willing make term contract for Yakimas and cancel sale Cosumnes twelves period You can appreciate that we must know your conclusions now so we can [55] complete our nineteen twelve deliveries to other buyers please wire us fully direct to San Francisco period. We do not think you can rush sale of two thousand Cosumnes as all big deals at present are for Oregons for export.

E. CLEMENS HORST CO.

Charge E. C. H. Co.
154 words.

San Francisco, October 15, 1912.
In reply refer to S–55445.

Pabst Brewing Co.,
Milwaukee, Wis.

Gentlemen:—

We confirm interchange of telegrams with you today, as follows:

Received from you—

"Must see samples Cosumnes deliveries you can make equal four samples mailed you as we expect to dispose of same on coast."

Sent to you—

"If you wire you will accept hops equal samples you sent we will arrange accumulate such hops for you but we cannot submit you further samples without we buy hops and we cannot buy and increase our stocks unless you wire you will accept hops equal your samples period. In replying please answer yesterdays inquiry from whom your samples received period. We offer our best services for resale of any hops you do not require."

Yours faithfully.

E. CLEMENS HORST CO.,

TBS–PK. [56]

POSTAL TELEGRAPH–CABLE COMPANY.

NIGHT LETTERGRAM.

777CH A 34 NL.

Milwaukee Wis Nov. 4, 12.

E. Clemens Horst Co.

San Francisco,

Cannot accept samples as they are not according to choice quality specified in contract we herewith cancel contract for two thousand bales entered into with you because of your inability to comply with specifications.

PABST BRG. CO.

725 P. [57]

Mr. DEVLIN.—We offer in evidence the following night letter from defendant to plaintiff:

POSTAL TELEGRAPH-CABLE COMPANY.
NIGHT LETTERGRAM.

San Francisco, Nov. 5/1912.

Pabst Brewing Co.,
Milwaukee, Wis.

Replying your yesterdays wire received today we disagree with your comments on quality of samples sent you and to your statement that we are unable to comply with our contracts with you. Please wire us in what respects your claim samples twenty five to thirty eight inclusive to be below contracted quality and whether you claim none of all samples sent you is equal contracted quality. Please also wire whether you will pay us decline in market if we consent cancellation two thousand bale sale we cannot release contracts without proper settlement we suggest that our letter October eighteenth offers fairest method of adjusting matter. We are willing submit further samples and are willing that Chief Inspector of San Francisco Chamber of Commerce or other high class competent disinterested parties to be agreed upon shall pass upon quality.

E. CLEMENS HORST CO.

Mr. POWERS.—We object to that as irrelevant and immaterial and as [58] an offer of compromise, and in no way connected with the contract or any issue in the case.

The COURT.—I think it was simply admitted before as part of the correspondence. As far as its

effect is concerned, that is a different thing.

Mr. DEVLIN.—We introduce the letter simply to show the correspondence between the parties and do not introduce it for the purpose of showing any offer of compromise. It refers to another letter that I am going to read later on—a letter just before the repudiation. The reason it is admissible is that it refers to a letter of October 18th which was written before the repudiation of November 4th.

The COURT.—It was not admissible as an offer of compromise but as a part of the correspondence. It may be admitted but only as constituting part of the correspondence.

EXCEPTION I.

Plaintiff thereupon offered and there was introduced in evidence a day letter from plaintiff to defendant dated November 7, 1912, reading as follows: [59]

DAY LETTER.

WESTERN UNION TELEGRAPH COMPANY.

Received at S. E. Cor. Pine and Montgomery Sts., San Francisco.

W 1071 CH UN 93 Blue

Milwaukee Wis., Nov. 7, 1912.

E. Clemens Horst Co.,

San Francisco, Cal.

Samples we sent you represent choice quality consumnes which our contract specifies and to which none of your samples compare period our judgment and experience sufficient to warrant our action in cancelling contract because of insufficient quality samples submitted by you period have partially cov-

ered quality at higher than our contract price with you because of our rejection therefore will not entertain suggestion to pay you difference period will not have further discussion on this and if you consider our action arbitrary take such action as you may deem best for your interest.

PABST BRG. CO.,

11:40 A. M. [60]

Mr. DEVLIN.—We offer night letter, plaintiff to defendant, dated November 7, 1912: [61]

NIGHT LETTER.

S. F., Nov. 7, '12.

Pabst Brewing Co.,

Milwaukee, Wisc.

We cannot possibly realize anything like contract price for any Coast Hops regardless quality and with present weak and declining market and big American Hop surplus it is impossible to find buyers for Two Thousand bales except at big sacrifice from present low prices period we respectfully repeat our request that you specify in what particulars samples last sent are claimed below contract requirements we will then without prejudice our rights submit further samples of contracted quality satisfactory to your period we repeat our offer to arbitrate period if you decline arbitrate we hope you will cooperate with us to adjust differences.

E. CLEMENS HORST CO.

Charge. [62]

Mr. POWERS.—We object to that as not addressed to any issue in the case, a self-serving declaration, anticipatory of litigation in order to

make an argument , and is an offer of compromise.

The COURT.—It is not offered as an offer of compromise.

Mr. DEVLIN.—No.

The COURT.—As part of the correspondence I think it is quite admissible.

Mr. POWERS.—Exception.

EXCEPTION II.

Mr. DEVLIN.—We offer in evidence letter, plaintiff to defendant, dated November 8, 1912, reading as follows: [63]

San Francisco, November 8, 1912.

In reply refer to H–55804.

Pabst Brewing Co.,
Milwaukee, Wis.

Gentlemen:

We confirm interchange of telegrams with you, as follows:

Received from you November 7th—(Day Letter)

"Samples we sent you represent choice quality Cosumnes which our contract specifies and to which none of your samples compare period Our judgment and experience sufficient to warrant our action in cancelling contract because of insufficient quality samples submitted by you period. Have partially covered quality at higher than our contract price with you because of our rejection Therefore will not entertain suggestion to pay you difference period Will not have further discussion on this and if you consider our action arbitrarily take such action as you may deem best for your interests."

Sent to you November 7th—(Night Letter).

"We cannot possibly realize anything like contract price for any Coast hops regardless quality and with present weak and declining market and big American hop surplus it is impossible to find buyers for two thousand bales except at big sacrifice from present low prices period. We respectfully repeat our request that you specify in what particulars samples last sent you are claimed below contract requirements we will then without prejudice our rights submit further samples of contracted quality satisfactorly to you period We repeat our offer to arbitrate period If you decline arbitrate we hope you will co-operate with us to adjust differences."

Yours faithfully,

E. CLEMENS HORST CO.

E. C. HORST,

Pres.

ECH/PK. [64]

Mr. POWERS.—We make the same objection as was made to the last question.

The COURT.—Objection overruled. Same objection and exception.

EXCEPTION III.

Mr. DEVLIN.—We offer letter, plaintiff to defendant, dated November 12, 1912.

San Francisco, November 12, 1912.

In reply refer to H–57411

Pabst Brewing Company,
Milwaukee, Wis.

Gentlemen:

We confirm telegrams with you today, as follows:

Sent to you—

"Received no reply wire November seventh would appreciate reply."

Received from you—

"Our day letter seventh fully states our position."

Sent to you—"(Night Letter).

"We understand from previous correspondence that you will not accept deliveries equal to any of the samples in the two lots of samples we sent you and that you will not consider any further samples we may submit you for delivery and that you will not accept any deliveries from us and that you will not arbitrate period Upon receipt of your confirmation of your above position we will not trouble you with further communications except by your request though we would appreciate personal interview later on with a view of adjusting matters."

Yours faithfully,
E. CLEMENS HORST CO.,
E. C. HORST,
Pres.

ECH/PK.

53/4 [65]

Mr. POWERS.—We make the same objection and have the same ruling and exception.

The COURT.—It will go in under the same limitations.

EXCEPTION IV. [66]

PABST BREWING COMPANY.

Milwaukee, Wis., Oct. 4th, 1912.

E. C. Horst Co.,

San Francisco, Cal.

Gentlemen:

Your valued favor of the 28th ult., at hand and contents noted. Have also received the line of samples of Consumnes hops, which should represent our order of 2000 bales for this season, but are sorry to state that after very close inspection it will be impossible for us to accept hops of this nature on our contract, as same are not choice.

Yours truly,

PABST BREWING COMPANY,

By C. Z.

CZ–M.

TELEGRAM.

San Francisco, Oct. 9th, 1912.

Pabst Brewing Co.,

Milwaukee, Wis.

Please wire our expense wherein you claim samples submitted are below quality sold we are anxious do everything to meet your wishes.

E. CLEMENS HORST CO.

Charge E. C. H. Co.

22 words.

53/4 A [67]

NIGHT LETTERGRAM.

San Francisco, Oct. 9, 1912.

Pabst Brewing Co.,
Milwaukee, Wis.

Referring your today's wire please send us line of samples of such consumnes hops as you will accept.

Chge. E. C. H. Co.

E. CLEMENS HORST CO.

TELEGRAM.

516 chwx 29

Milwaukee, Wis., Oct. 9–12.

E. Clemens Horst Co.
Sanfran

Answering your telegram ninth color shows no life picking poor flavor and substance of samples submitted by you in no way compare with other choice consumnes submitted by others.

PABST BRG. CO.

136 p. [68]

PABST BREWING COMPANY.

Milwaukee, Wis., October 10th, 1912.

E. Clemens Horst Co.
San Francisco, Cal.

Gentlemen:

In reply to your telegram of today, we beg to state that we have forwarded you four samples, of choice Cosumnes hops.

Kindly compare these with your samples, and oblige,

Yours truly,
PABST BREWING COMPANY,
By CZ.

CZ–M. [69]

NIGHT LETTERGRAM.

San Francisco, October 14, 1912.

Pabst Brewing Co.,

Milwaukee, Wis.

Have received from you two of four samples advised in your letter October tenth please wire us that you will accept deliveries equal to those four samples and we will try arrange deliveries accordingly and if you will please wire us from whom you received the four samples you sent us we will try to purchase the identical lots for deliveries to you.

E. CLEMENS HORST CO.

Chge. E. C. H. Co.

63 words.

NIGHT LETTERGRAM.

San Francisco, October 15, 1912.

Pabst Brewing Co.,

Milwaukee, Wis.

If you wire you will accept hops equal samples you sent we will arrange accumulate such hops for you but we cannot submit you further samples without we buy hops and we cannot buy and increase our stocks unless you wire you will accept hops equal your samples period in replying please answer yesterdays inquiry from whom your samples received period we offer our best services for resale of any hops you do not require.

E. CLEMENS HORST CO.

Chge. E. C. H. Co.

DAY LETTER.

W. 1095 CH FS CX 22 Blue

Milwaukee, Wis., Oct. 15–12.

E. Clemens Horst Co.

San Francisco, Calif. [70]

Must see samples consumnes deliveries you can make equal four samples mailed you as we expect to dispose of same on coast.

PABST BRG. CO.

12 10 pm.

Mr. DEVLIN.—I offer the following letters:

San Francisco, Oct. 18th, 1912.

In reply refer to H–53959

Pabst Brewing Co.,

Milwaukee, Wis.

Gentlemen:—

We are without answer from you to our wire of Oct. 15th.

As you will not take the 2000 bales Hops sold you on quality equal to any of the 20 samples we sent you, nor commit yourselves to take any Hops equal to the four samples you sent us, we fell the fair plan that should be most suitable to you will be to agree upon a difference in price to be paid us on the 2000 bales.

To arrive at that amount, we should get, if market had not changed, the fair profit as between simultaneous buying and selling prices, and as market has declined we should get in addition, the decline in the market, but if you think that this is asking too much we are ready to accept, subject to our confirmation within three business days after receipt of your re-

ply, whatever may be the difference between the contract price and any figure you may offer us now on 2000 bales 1912 Hops equal to the four samples you sent us, or to the selection of the 20 we sent you. The new offer to be made on basis of delivery in lot or lots at sellers option during October to February inclusive, and official inspection of the San Francisco Chamber of Commerce, or other inspection to be mutually agreed upon, to be final.

Or if you prefer to delay the fixing of price on above plan, we are willing that you pay us the difference as of a later date plus what would be the carrying charges on 2000 bales Hops, which we estimate to amount to about $750.00 per month covering interest, storage, insurance and loss in weight. The delay in delivery has already entailed a loss of $1000.00 on such charges, but we are not asking you to make good that $1000.00.

On our above plan you cannot increase your losses nor your hop stocks, because if we accept the price you offer on the new 2000 bale deal you will not have increased your stocks, as our acceptance of your offer will have cancelled the old deal and the new price you offer will be used as a basis for our arriving at the amount of money you should pay us by reason of cancellation of your present contract.

We have made our suggestion for the new offer to buy 2000 bales simply so you do not wire us as too high price for basis of adjustment. [71]

You no doubt realize that 2000 bales Hops is an enormous block of Hops to sell at any time of the year and at a time as late as this it is always much

harder to sell Californian Hops and there is an enormous difference between the price at which any one in the Hop business would buy 2000 bales and the price at which he would sell 2000 bales, unless, of course, the purchase was being made without speculation against a concurrent sale or offer.

In order to realize anything like current prices for Hops they have to be peddled at enormous selling costs and we really do not know how long it will take us to sell elsewhere 2000 bales Californian Hops so late in the season, but we want to help out all that is possible.

We made you a number of offers to change your purchases to Sonomas, Oregons, Washingtons, Yakimas, States or foreign 1912's or to change from 1912's to future years, all at fair price differences to be agreed upon, but regret that these suggestions, as well as our offers, both before and since the harvest, to resell for your account your 2000 bales purchase were all declined.

We are desirous of impressing upon you that we do not wish the slightest advantage by reason of your change of mind on your Cosumnes Hop Purchases, but we do ask your consideration for a prompt and fair adjustment of the matter and we hope our above suggestion will meet your approval.

No doubt you realize that your publishing the fact that you will not use Cosumnes Hops greatly depreciates their market value and the greater such depreciation the greater your loss, and, therefore, it is far better in both your interest and ours that the market value of the Consumnes Hops be maintained.

There are plenty of brewers that are having successful results with our Cosumnes Hops and it does not pay to influence their minds against them.

Faithfully,
E. CLEMENS HORST CO.
E. C. HORST,
Pres.

ECH/J. [72]

Mr. POWERS.—We object as irrelevant and immaterial and not addressed to any issue in the case and written for the purpose of anticipating a law suit, and a self-serving declaration to argue in effect in a subsequent lawsuit.

The COURT.—I will let it go in as part of the correspondence.

Mr. POWERS.—We except.

EXCEPTION V.

Testimony of E. C. Horst, for Plaintiff.

E. C. HORST, called for plaintiff, sworn, testified as follows:

Direct Examination.

(By Mr. DEVLIN.)

I am President and Manager of the plaintiff and have been such for sixteen or seventeen years. Have had experience as a hop grower and dealer for thirty years in the United States and Europe. I have sold all over the world and have grown hops on the Pacific Coast for thirty years and am familiar with the terms and usages of the hop trade. Was engaged in raising hops in the Cosumnes River district in Sacramento County about fifteen miles from Sacra-

(Testimony of E. C. Horst.)

mento City on the Consumnes River, and raised 4,500 bales of hops that year. The Consumnes district is that district in Sacramento County that borders the Consumnes River, and the hops grown in the Consumnes district are known in the trade as Consumnes River hops. Have been raising hops there for fifteen or twenty years. There are hops grown elsewhere in California. Those grown in the American River district are called American River hops; on the Sacramento River, Riverside hops, Yolos, Yubas, Mendocinos, Sonomas and Tehamas are the principal ones. Yakima hops are grown in the State of Washington. In the Yakima Valley. I am personally familiar with the hops grown upon our ranch on the Consumnes River, known as Consumnes hops, in the year 1912. I saw the hops grown on our Consumnes ranch in 1912 before they were baled. The air-dried are those that are dried by forcing hot air through the hops from outside instead [73—74] of drying them over a fire in the same building. The latter are called kiln-dried hops. Those raised in 1912 on its place on the Consumnes River were air-dried hops. They were cleanly picked; picked by machinery. Those raised by plaintiff were all of the same grade with the exception of about 150 bales which were not as good as the others. That would leave 4,350 bales of hops, and those 4,350 bales were choice Consumnes hops. The 150 bales which were not as good, were not mixed in any way with these 4,350 bales, but were altogether separate. A choice hop is a relative

(Testimony of E. C. Horst.)

grade that is not as good as fancy and better than prime. There is no well-defined line between the different grades. The distinction between the grades of hops is as follows: The first difference is one of geography, dividing up the districts; and then the best hops in that particular district are fancy, and the second best are choice, and the third best are prime, and the fourth best are medium, and the fifth best are common. I sent samples of the 4,350 bales of choice Consumnes hops to the Pabst Brewing Company. Plaintiff had on hand from the time the hops were picked up to November 4, 1912, something over 3,000 bales of choice Consumnes hops grown in that district. [75]

Q. Did you in the year 1912 send any samples of the hops grown by you in the Cosumnes district to the defendant?

Mr. POWERS.—We object to that unless it be shown that they were tendered to defendant subsequent to October 23, 1912, when the agreement was entered into with reference to the four samples.

Objection overruled and exception.

EXCEPTION VI.

A. Yes, sir. At first I sent twenty samples, I believe, or thereabouts and I afterwards sent another lot of samples. Among the second lot of samples was one of the samples which Pabst sent me and which I sent back to Pabst. Some of the second lot of samples were of my own hops and some were of other hops. One of the second lot of samples was one of the samples which Pabst sent to me and I sent

(Testimony of E. C. Horst.)

back to Pabst. Samples 1 to 20 fairly represented the grade of the hops from which they were taken. They were choice air-dried Cosumnes of the 1912 crop. They were rejected by the Pabst Brewing Company. Defendant afterwards sent plaintiff four samples of which only three were received. I subsequently sent them back a second lot of samples including one of the samples they sent me. They rejected that along with the others. Hops are practically all sold by private solicitation, as there is no hop exchange as for barley and wheat. Hops are sold by salesmen travelling around among the brewers. There are about two or three hundred salesmen for five hundred brewers. There is a regular freight rate to all points from California to all eastern points of 2 cents a pound gross weight. The freight rate is from the Pacific Coast to all Eastern cities outside of the Southern route down to Georgia, Florida, where the freight rate is higher. In the hop trade the weight of hops, which is meant by a bale of hops, is a package running from 170 or 180 to 225 pounds. I retained portions of the [76] samples for identification that I sent to Pabst and kept them in my office in San Francisco. Samples of hops deteriorate by age through losing in appearance and the general characteristics of the products hops begin to deteriorate along about a year after the crop is harvested and keep on deteriorating, and the samples in the courtroom are a lot poorer today than they were in 1912. The lupulin which is the pollen of the hop gives the aroma. [77] The hop

(Testimony of E. C. Horst.)

is simply a bitter taste and a preservative. Six or seven of the first twenty samples are missing.

The COURT.—My recollection is that when they were handled at the last trial so much that many of them went to pieces.

The WITNESS.—The missing samples were of the same general character as those now present; the same growth of hops and the same harvest, and the samples now present represent the quality of hops from which they were taken. The samples constituting a portion of the original 1 to 20 are strictly choice Consumnes hops of the crop of 1912. I subsequently received from defendant four samples of hops. The witness produced four such samples.

Mr. DEVLIN.—How did the hops that you have just referred to as the four samples sent you by the Pabst Brewing Company compare with the samples which were portions of the original samples 1 to 20?

Mr. POWERS.—We object as irrelevant and immaterial, and not addressed to any issue in this case because they have never been tendered to defendant as equal to the samples sent by defendant to plaintiff.

Objection overruled. Exception noted.

EXCEPTION VII.

WITNESS.—They are the same grade of hops.

WITNESS — (Continuing.) We subsequently sent the defendant other samples Nos. 25 to 38. These samples compared with the samples 1 to 20 were the same general type and the same grade of hops. One of these samples is a part of a sample

(Testimony of E. C. Horst.)

defendant sent to us. The sample was exactly like another sample that I had already sent them, which they had rejected, so as to have no question in my mind that they proposed to reject everything, I sent them back one of the samples. I put it in a different package and sent it to them. I have agents in several cities where hops can be sold and keep in touch with the agents and employees. We buy hops and raise a large proportion of the Pacific Coast crop. I know the value of strictly choice Consumnes hops in Milwaukee in November, 1912. [78]

Mr. DEVLIN.—What was the market value of choice Consumnes hops in Milwaukee or thereabouts in November, 1912?

A. For the quantity involved 14 cents a pound.

Mr. POWERS.—I move that the answer be stricken out as not responsive to the question and is a qualification.

The COURT.—Mr. Horst, I will ask you to answer that without qualification. I think Mr. Powers is right. That is, what the market value of the hops was of that character, leaving out the question of quantity. There are many instances where, if you were dealing under certain conditions, circumscribed by a particular quantity, the question of quantity would affect the market price, but that is not this case.

A. I put the value at 14 cents. That was the range of prices from the first of November until about the first of January. The market was dead all the time. It was a dead market for the whole year.

(Testimony of E. C. Horst.)

November 4, 1912, plaintiff had on hand and was able to deliver 2,000 bales of strictly choice Consumnes hops to the defendant. Nothing has been paid on account. We made sales of Consumnes hops during the months of November and December, 1912, in the eastern brewing centers, at Chicago and New York and eastern points, where the market value was the same as at Milwaukee. The freight rate would be the same. The freight rate is 2 cents from California. The sales of plaintiff's hops in November, 1912, of Consumnes hops of our growth of choice Consumnes hops in November or thereabouts the prices ran about 14½¢ to about 17½¢; they averaged about 15¢. I have not got the dates in mind. I can tell them from the books by looking through the books. I know of one sale in May by another dealer at 16¢ or 16 and a fraction at the end of November or the beginning of December, 1912, that is the only one I can recall now. [79]

Cross-examination.

(By Mr. POWERS.)

Q. The sales were in carload lots?

A. The sales made at 14 and 17¢ were in all kinds of lots, some small and some large, that is carload lots and less than carload. We got what we could get.

Mr. POWERS.—We offer in evidence night letter from defendant to plaintiff dated October 21, 1912.

(Testimony of E. C. Horst.)

Milwaukee, Wis. Oct. 21, –12.

E. Clemens Horst Co.,

San Francisco.

Will accept hops on contract equal to four samples you received from us but insist upon you forwarding samples of deliveries before shipments go forward."

Also insert letter plaintiff to defendant, dated October 24, 1912.

San Francisco, October 24, 1912.

In reply refer to H–55641.

Pabst Brewing Co.,

Milwaukee, Wis.

Gentlemen:—

We received your wire of October 21st, as follows: "Will accept hops on contract equal to four samples you received from us but must insist upon you forwarding samples of deliveries before shipments go forward."

The above wire was no doubt sent before your receipt of our letter of October 18th, and we are now awaiting your reply to our above letter.

Faithfully,

E. CLEMENS HORST CO.

E. C. HORST.

ECH/PK.

WITNESS.—I don't think I said I received four samples. My recollection is that we received three samples instead of four samples. I may not be correct because I have not thought of this thing for years.

Mr. POWERS.—We offer in evidence letter, defendant to plaintiff, dated October 23, 1912. Also letter plaintiff to defendant, dated October 29, 1912. Letter dated September 4, 1911, Horst to Pabst. [80]

PABST BREWING COMPANY.

Milwaukee, Wis. October 23rd, 1912.

E. Clemens Horst Company,

San Francisco, Cal.

Gentlemen:

195

Your favor of the 18th inst., at hand and contents noted.

We beg to state that we never committed ourselves not to take the 2000 bales Choice Consumnes hops on contract, equal to the four samples we submitted to you, as you will note in our telegram to you of October 21st, to which we have no reply at the present time, in which we asked you to forward samples of deliveries you can make equal to the four samples mailed you, and furthermore we beg to state that there was no specified time mentioned when hops were to be shipped, and the entailed loss you have had up to the present time by holding these hops has nothing to do with this deal whatever. If you could have delivered choice Cosumnes equal to the four samples mailed you we would have accepted same, but insisted on you forwarding samples, which you have not done up to the present time. We certainly would not accept any Cosumnes equal to any of your 20 samples submitted to us, as the quality is

too poor. Furthermore, we beg to state that our *reying* to dispose of same on the Coast would not prevent you from forwarding samples, as we must insist upon seeing what we buy.

We are also desirous of letting you know that we use Cosumnes and Sacramento hops in our brewery, but of a much better quality than any of your samples submitted. What we have published is that we would not use any more Consumnes like your 1911 shipment, which you must admit were the poorest picked hops on the Coast. We are also not at liberty to let you know from whom we received the four samples choice Consumnes, but must insist upon you forwarding samples of choice Consumnes equal to the four samples, whether you have same in stock or not.

Hoping to hear from you, we remain,

Yours truly,

PABST BREWING COMPANY,

By C. Z.

CZ–M.

San Francisco, Oct. 29th, 1912.

In reply refer to H–57158.

Pabst Brewing Co.,

Milwaukee, Wis.

Gentlemen:—

1912 CROP HOP SALES.

Received your favor 23rd inst.

By special Delivery mail we send you today a line of samples #25 to 38 inclusive, equal to which we are ready to make deliveries to you.

We have just satisfactorily completed a 1500 bale delivery of 1912 Choice Hops to one of our Middle West clients. These 1500 bales were on the same line of samples as above sent you.

Faithfully,
E. CLEMENS HORST CO.,
E. C. HORST.

ECH/J. [81]

Sept. 4th, 1911.
In reply refer to H–39811.

Pabst Brewing Co.,
Milwaukee, Wis.

Gentlemen:—

Enclosed herewith we hand you contracts in triplicate for the two lots of 1000 bales Choice Pacific Coast 1912 crop Air Dried Cosumnes Hops, as per telegraphic sales made you on August 26th, and August 29th respectively.

Please be good enough to sign all three contracts of each set and return two of each set to us.

If you do not wish the sharing clause (clause 18) of the contract, please strike it out, and in that case the elimination of that clause will be satisfactory to us.

We appreciate you orders and confidently expect that the contract will result in a considerable profit to your good selves.

At this time, we beg to suggest again the advisability of your contracting a further quantity of 1912 crop and especially as to your contracting for a term

(Testimony of E. C. Horst.)

of years beginning with 1913 and on such a contract we will make you a specially low price.

Faithfully yours,

E. CLEMENS HORST CO.,

E. C. HORST.

ECH/J.

Encls.

P. S.—Also enclose contract in triplicate covering 500 bales 1911 crop Choice Brewing Pacific Coast Air Dried Consumne Hops, as per sale of August 23d. [82]

Mr. POWERS.—Did the Pabst Company execute that triplicate agreement?

A. No, sir.

WITNESS.—We had on hand 3,000 bales of choice Consumnes hops on November 4, 1912. They were of the character of samples 1 to 20 and were manufactured by ourselves to fill this contract. One of the samples 25 to 38 was a portion of one of the samples which had been forwarded by Pabst to plaintiff.

Q. Do you remember on the former trial of this case, held on April 16, 1914, testifying as follows:

"Q. Did you tell Mr. W. E. Gerber that one of the samples forwarded by you was the same as one of the samples forwarded by Pabst to you?

A. I did not say so, no, sir. I will tell you what I did say, if you want me to.

Q. Tell me.

A. I told him when the Pabst people sent me the four samples, I took the four and matched up those hops identically so that nobody on God's earth could

(Testimony of E. C. Horst.)

tell the difference, and I sent them such a line of samples, and they even rejected those [83] very samples. The Pabst people informed Mr. Gerber that I sent back the identical sample, but I did not.

The COURT.—Q. You sent back an identical lot of hops in one sample?

A. No. They sent me the samples, and then I matched them and tendered them the hops, and they could not tell them from any other sample that they had sent me. They were mistaken.

Q. Which is the fact?

A. I tell you, this happened so long ago I may be mistaken on that thing.

Q. Mistaken now, or before?

A. I don't know.

Q. Are you mistaken when you testified yesterday or when you testified at the former trial?

A. I don't know.

Mr. DEVLIN.—Mistaken about what.

Mr. POWERS.—He said yesterday that he sent back a portion of the sample.

The COURT.—If you will listen to the witness—perhaps you have difficulty in hearing him—he is saying he cannot tell whether his statement yesterday was correct or the other, it is so long ago.

Mr. POWERS.—Q. Your mind was fresher when you testified before than yesterday, was it not?

A. Yes.

Mr. POWERS.—Where were the 3,000 bales of choice Consumnes hops available for delivery on November 4, 1912?

(Testimony of E. C. Horst.)

A. There was about 1,200 or 1,300 bales on the coast, about 400 in Milwaukee, about 250 on the way east in transit and the balance of them were in Chicago and New York; about 500 in each place. I don't know whereabouts they were in Chicago or in New York or where they were stored in Milwaukee, but I can find out.

Q. Were they all of the kind manufactured by yourself? A. Yes.

Q. You shipped about 1,500 bales of choice Consumnes hops to the Schlitz Brewing Company in Milwaukee did you not?

A. I shipped some; I did not ship 1,500 bales. I shipped Schlitz a lot of the [84] hops and after Pabst had rejected the hops I shipped Schlitz the hops and Schlitz accepted them.

Q. Did you not ship the hops to Schlitz in August, 1912?

A. I can't tell you off hand. They were in the warehouse and on the railroad tracks. We have got a record of it and I will furnish the record. My recollection is that there were only 1,300 bales on the Coast. I will find out. I had the hops under my control and I figured that Pabst was not going to take any hops and so I was prepared to use my hops at other places.

Q. There were 497 bales that you had set aside to fill contracts already in existence?

A. Set aside is not using them. I presume I had my mind made up how to get rid of the hops long before the 4th of November.

(Testimony of E. C. Horst.)

Q. Did you not set aside for other purchasers some of those 497 bales before November 4, 1912?

A. I don't know whether I did or not, but if I did there were still plenty of hops left to make 2,000.

Q. How could you expect to deliver to Pabst 2,000 bales of hops in Milwaukee or the Coast on November 4, 1912, if you only had 1,300 bales on the Coast?

A. I knew well that Pabst weren't going to take any hops at all, and second, I knew I could ship them back to the Coast and deliver them there.

Q. And to do that you would have to go to the expense of 2¢ back and forth would you not?

A. Yes, sir.

Mr. POWERS.—Did you buy choice Consumnes hops of Wolf, Netter & Company of the character of samples 1 to 20 in November, 1912?

A. I bought a special lot of hops from Wolf, Netter & Co. in November, 1912, at 17¢ a pound to fill some special orders I think about 100 bales that were Consumnes hops.

The COURT.—Was there a difference in price in selling to another grower from what you would sell to a brewer?

A. It is a kind of [85] matching up; sometimes you pay a lot more to a farmer than you are able to get from a brewer, for the same grade of hops. Of course, as a general thing, it is the other way. It is generally true that the price to the farmer is less than the price to the brewer, but plenty of times we pay more to the farmer at the same time we are selling to a brewer; it is a case of matching up particu-

(Testimony of E. C. Horst.)

lar samples, when you have to have a particular sample for a particular purpose.

Q. In November, 1912, there was a difference in price in Consumnes hops of the character in question between dealer and dealer and dealer and brewer?

The COURT.—Now, let me understand you. You want to ask him if a dealer in selling to another dealer would charge a different price from what he would if he were selling to a brewer?

Mr. POWERS.—Yes.

A. I don't know of any rule on that thing. The trades are separate trades; each one works on its own merits—the facts surrounding each trade—

Q. (Interrupting.) What is the custom?

A. If a dealer can sell to another dealer, he would rather sell to another dealer at the same price than he would sell to the brewer.

Mr. POWERS.—At the former trial—I am going to read from page 118 of the transcript—did you testify as follows:

> "The reasonable allowance to a broker for making a sale of hops in November and December, 1912, is 1½¢ a pound. We pay from 1¢ to 1½¢. On a cent and a half a pound, we expect the man to pay the expenses. Brokers that sell between dealers and dealers get ½¢ and some of them get only ¼ of a cent. These brokers that do business between the farmer and dealer, they get ½ a cent. Some of *the get* ¾ of a cent. Brokers contract for the same price when selling for the dealers as they do for the [86] grower."

(Testimony of E. C. Horst.)

Q. Did you testify? A. Yes.

Q. Is that the truth? A. Yes.

The COURT.—That is wholly different matter from what you have been asking about. There you are asking about the percentages allowed on contracts between dealers.

A. Wolf, Netter & Co. were dealers in hops in November, 1812, so that when I bought from Wolf, Netter & Co., it was a transaction from dealer to dealer.

Q. Now, what is the usual profit allowed from a dealer to a brewer?

A. It runs all the way from nothing up to 10 or 15¢ a pound, and at that particular time the profits on some of the trades ran as high as 10¢ a pound, at that particular time.

Q. In November, 1912? A. Yes.

Q. When hops were selling for 14¢, they got as high as 10¢ a pound?

A. We bought at that time at 12¢ a pound hops that we sold at the same time at 22¢ a pound.

Q. I am talking about the Consumnes hops.

A. Consumnes hops, that is only a limited quantity of hops.

Q. Did you buy any Consumnes hops at 12¢ a pound in November, 1912?

A. I think I bought only one lot of Consumnes hops in that year, that lot that I bought from Wolf-Netter.

Q. So that when you are talking about 12¢ a pound, you are not talking about Consumnes hops?

(Testimony of E. C. Horst.)

A. It is about the same proposition, the marketing of hops out here on the coast.

Q. You are not saying however you bought Consumnes at 12¢?

A. I tell you I bought only one lot of Consumnes, that was about 100 bales that I bought from Wolf. I did not buy any other Consumnes hops the whole year.

The COURT.—What was the total production of Consumnes hops that year?

A. I guess the total production was about 6,000 bales, of which we raised.

Mr. POWERS.—Do you know of any sales of any other Consumnes hops in November, 1912, choice Consumnes hops for 14¢ a pound in November, 1912?

A. I don't know of any sales of Consumnes hops at all outside of this one sale to us and the sale of our own crops, and the prices that I have been talking about to you were relative to the other lots in the Sacramento Valley and in Oregon.

Q. Then the prices that you are mentioning now are the prices of Consumnes hops raised by yourself and those only? [87]

A. Well, there is one part where I mention the price that we got for our Consumnes, but I have been talking about prices on other hops as well.

Q. Now, then, will you give me the selling price of any Consumnes hops, choice Consumnes hops, that were sold in November, 1912, by anybody?

A. The only sale of Consumnes hops that I know of is the 100 bales that I bought from Wolf, Netter,

(Testimony of E. C. Horst.)

and Consumnes hops that I sold of my own crop.

Q. You kept track of the entire market during November, 1912, did you?

A. Well, I kept track of the market, yes, but I don't know—I knew it at the time, but I don't know now.

Q. Do you know that Mr. Sweeney bought some Consumnes hops of Mr. Spicer, through Wolf, Netter that were raised in November, 1912, for 18 ¾¢ a pound in November, 1912?

A. I presume there were peculiar conditions surrounding the transaction that made such a transaction possible. I know that the market was not anything near that, that year. I heard of this sale afterwards. My understanding is that he, Sweeney, did not buy it from Spicer; he bought it from somebody else, and paid Spicer a commission for buying it and in fixing the price, you tack the commission on to the price for the buying. A broker's commission at that time was ½ a cent a pound to ¾ of a cent.

Q. So that the grower got 18 or 18½¢ per pound for choice?

A. I do not know any more about it than that I heard of it afterwards.

Q. Now then, when you sold your hops after November, 1912, for 14¢ and 17¢ which you told about, you knew that the Pabst sale was off.

A. Yes.

Q. And at the time you bought Consumnes hops for 17¢ from Wolf, Netter?

A. Yes, for a particular purpose.

(Testimony of E. C. Horst.)

Q. With reference to the samples 25 to 38 sent by you to defendant some of them were not your own growth?

A. That is my recollection now; some were not my own growth; I do not remember whether some were not Consumnes. I cannot tell you without reference [88] to the office record whether we had any hops from which we shipped samples 25 to 28, in our possession.

Q. Then as I understand you, you did not have the Consumnes hops on hand except those of your own manufacture which were represented by samples 1 to 20. A. That is all.

Q. Didn't you commence to pick hops that year on August 12, 1912?

A. I don't know the date now.

Q. Didn't you pick them unusually green that year? A. I did not.

Our hops in the Consumnes district get ripe earlier than anybody else's. There is one tract that ripens earlier than ours.

Q. What is a choice hop?

A. Any hop that has not any particular, any serious [89] fault, is a choice hop of the district in which it is grown.

Q. Did you testify at the former trial as follows, at page 114:

"Q. When is a choice hop to be rejected because of the manner of picking, so far as its being dirty or clean?

A. When there is an excess of extraneous matter,

(Testimony of E. C. Horst.)

then it ceases to be choice. That is to be determined by any familiar with the hop growing. People who are competent to distinguish must use their own judgment as to whether or not the amount of extraneous matter is present sufficient to prevent it from being a choice hop."

Q. Is that true?

A. Yes; that says "excess of extraneous matter."

Q. On page 123, did you testify at the last trial as follows:

"The soundness of hops is produced by drying and curing. The factors which go to make up the value of a hop are the district in which it is grown, the time of picking, the proper picking as to the season, and the fatness and fulness of the hop. Its freedom from spider damage, its freedom from louse, and freedom from discoloration. Freedom from curing defects or baling defects. Proper picking. Curing includes drying. It is impossible to get any hops that do not contain more or less leaves."

A. It is impossible to get a hop that does not contain more or less other foliage.

Q. Are those facts therein stated the truth?

A. Well, when I use the word freedom from this and freedom from that, I do not mean that—

The COURT.—You mean in a comparative sense?

A. Comparatively speaking.

The COURT.—We went all over this.

Mr. POWERS.—I want to get my record in shape. I am going to prove that these hops were picked unusually green.

(Testimony of E. C. Horst.)

The COURT.—Why don't you just go to that fact?

Mr. POWERS.—I am trying to.

Q. Did you not at the last trial say that your hops were not any different in time of ripening from anybody else's hops? [90]

Mr. DEVLIN.—I object to that question, unless you make it a little more specific.

Mr. POWERS.—I will withdraw the question.

Q. Now, on page 107, you were asked the question: "What are the qualities of a choice Consumnes hop?

A. Soundness, properly cured, cleanly picked, good color, freedom from disease, freedom from mould, freedom from any form of damage. Lupulin also plays a part. It is grown in the hop, and whether or not it is is determined by looking at it.

Q. Then, according to your interpretation of that contract, the best of that crop during the year 1912 would have to be accepted by Pabst in compliance with your contract, whether they were choice hops, or not?

A. If the hops were sound, if the hops had no faults. I would not intend, if the hops were dirty, or the hops were damaged, or poorly dried or picked, or bad in any other way, that they would be choice hops.

Q. They had to be the general quality of choice Consumnes hops?

A. Choice, air-dried, Consumnes hops."

Q. Are those statements of fact?

A. Yes, if you consider them in a liberal spirit, like when you say freedom from this and freedom from

(Testimony of E. C. Horst.)

that,—there is nothing free from any defect.

Q. Now, then, was not your picking machine out of order at that time, and were not your hops picked dirty that year?

A. No; the picking-machine became cleaner every year that I had the picking-machine.

Q. I am talking now of August, 1912: Wasn't your picking machine out of order, and were not the stems and leaves running into your hops when they were being baled into these bales?

A. No. With the exception of the pick-up-hops—150 or 200 bales, the rest of the hops were all choice?

A. Yes.

Q. Of equal choice? Was one bale different from the other?

A. Substantially equal. [91] There were some of the hops not clean, or something went wrong with them, and they were baled separately; I think there were 125 bales in the crop, and the balance of the crop, outside of the 125, were all right—the 125 were off. I do not know to whom they were sold.

Q. You say you heard of some sales of Consumnes hops at 16 and 16½ at the end of November, did you, as I understand it? A. Yes.

Q. At Milwaukee?

A. No, I think that sale was made in New York, or near New York.

Q. Who made it?

A. F. W. George Company.

Q. They are employees of yours?

A. They were not then.

(Testimony of E. C. Horst.)

Q. Who was the buyer?

A. I don't know; they sold them to a brewer in the east; I don't know who the brewer was. It was a carload lot; the quality of the hops was choice; I saw the samples.

Q. Mr. Horst did you not commence preparing for this lawsuit prior to the commencement of picking of the hops? A. Yes.

Q. Had not 200 bales of these hops been rejected by Slitz Brewing Company in Milwaukee prior to the time you sent these samples to the Pabst Brewing Co.?

A. I do not know. I could tell by my records. The sales made by us of choice Consumnes hops in the months of November and December, 1912, are as follows: Nov. 12, 1912, Park Brewing Co., Providence, R. I., 15 bales at 15¢ delivered at Providence, R. I.; Nov. 20, John Brewing Company, Uniontown, Pa., 15 bales 15½¢ at Uniontown; Nov. 19, 5 bales to T. W. McGowan, N. Y. 16½¢, delivered at N. Y., F. W. George & Company, Nov. 20, 10 bales at 16¢ delivered at N. Y., Nov. 16, 5 bales to Medina Brewing Company, Medina, N. Y., at 18¢ a pound delivered; Nov. 12, 1912, Springfield Brewers Company, Springfield, Mass., 98 bales at 15¢ delivered at Springfield; Nov. 12, 50 bales to Frank Steil Brewing Company, [92] Baltimore, Md., at 14½¢ delivered at Baltimore; Nov. 20, 1912, 20 bales to Eastern Brewing Company at Brooklyn, N. Y., 16¢ a pound delivered; F. W. George Company Nov. 13, 1912, 100 bales at 16¢ a pound delivered at Provi-

(Testimony of E. C. Horst.)

dence, R. I. I believe that sale was less one cent a pound. My impression was that we invoiced that to George, and that there was a cent a pound commission on it. That was the same that he made. I am just speaking from memory. I may be wrong. Nov. 20, 1912, 25 bales to J. M. Haffen Brewing Company, N. Y., at 15¢ delivered at N. Y. The dates specified was the dates of sale and not the dates of delivery. I made all selling prices and I was the supervising head of the concern. All of these hops were sold from our samples 1 to 20. I did not personally see the purchasers but I made the prices and the business was transacted by my subordinates in the east. But I made some of the sales myself, for instance I personally made the sale to George by telegram from my San Francisco office. I know that the Springfield Brewery sale was one I took personal direction of and also the one to Steil in Baltimore. Those are the only ones I remember having anything to do with it personally. [93]

E. CLEMENS HORST recalled for further cross-examination.

(By Mr. POWERS.)

Q. Did you at the former trial—I am reading from page 25—testify as follows on April 16:

"Mr. DEVLIN.—Q. What about the other 500?

A. The other 497 bales were used on sales that we had made previously, that is, sales we had made prior to November.

The COURT.—At what price?

A. The Cream City Brewing Company, Milwau-

(Testimony of E. C. Horst.)

kee, Wis., 75 bales at 16½ cents. Gottfried Brewing Company, Chicago, 116 bales at 17 cents. Cream City Brewing Company, Milwaukee, 8 bales at 17 cents. J. Hoheldel, Philadelphia, Penna, 10 bales at 20 cents; the same party, 10 bales at 17 cents. Krautz Brewing Company, Findlay, Ohio, 15 bales at 15 cents. Eagle Brewing Co., Utica, N. Y., 100 bales at 17½ cents. United States Brewing Company, Chicago, 91 bales at 17 cents. All of those—they were sales for Pacific Coast hops, and these hops were delivered on those sales.

Q. These contracts were made prior to November 4? A. Yes."

Q. Did you so testify? A. Yes, I guess so.

Q. Is that correct?

A. That sounds all right.

Q. Mr. Horst, with reference to the pick-ups, do you remember having made up a statement of bills for Mr. Powers, meaning myself, in which the number of pick-ups were shown as 169? Is that your signature (showing)? A. Yes.

Mr. POWERS.—I offer this paper in evidence. This paper was furnished to Mr. Powers by you as facts, was it not, from your books? A. Yes.

Mr. POWERS.—This is sales of 1912 crop, Consumnes hops, between August 12, 1912, and November 4, 1912, containing 975 bales, which refers to practically all of the bales known as the 497 bales which hitherto we have supposed were available for delivery on November 4. I offer this in evidence and ask to have it [94] considered as read.

Mr. DEVLIN.—As showing he did not have the hops, you mean?

Mr. POWERS.—Yes. [95]

The paper is as follows:

SALES OF 1912 CROP COSUMNE HOPS BETWEEN AUG. 12, 1912, AND NOV. 4, 1912.

Date of Sale. Month.	Year.	Sold to	B/—
Aug.	1912.	John Hohenadel, Philadelphia, Pa.	10
"	"	John Stanton Bgr. Co., Troy, N. Y.	4
"	"	Kittanning Brg. Co., Kittanning Pa.	5
Sep.	"	Peter Barman, Kingston, N. Y.	1
"	"	Kanawha Brg. Co., Charleston, Pa.	5
Oct.	"	Worcester Brg. Co., Worcester, Mass.	100
"	"	John Hohenadel, Philadelphia, Pa.	20
"	"	Geo. Cooke Brg. Co., Chicago, Ill.	10
"	"	Liebert & Obert, Philadelphia, Pa.	5
"	"	Gottfried Brg. Co., Chicago, Ill.	2
"	"	F. W. George & Co., New York, N. Y.	10
"	"	Citizens Brg. Co., Antigo, Wis.	5
"	"	Krantz Brg. Co., Fundlay, O.	15
"	"	Eastern Brewery, Brooklyn, N. Y.	20
"	"	Florida Brg. Co., Tampa, Fla.	5
"	"	Gambrinus Brg. Co., Chicago, Ill.	5

Date of Sale. Month.	Year.	Sold to	B/—
"	"	Eagle Brg. Co., Utica, N. Y.....	100
"	"	Bellaire Brg. Co., Bellaire, O.....	15
"	"	Thos. Zoltowski, Detroit, Mich....	5
"	"	Dayton Brws., Dayton, O.....	300
"	"	United Brws. Co., Chicago, Ill.....	100
"	"	Kewanee Brg. Co., Kewanee, Ill...	25
Nov.	"	United States Brg. Co., Chicago...	196
Oct.	"	Dayton Brws. Co., Dayton, O.....	1
"	"	F. W. George & Co., New York, N. Y.	1
"	"	Frostburg Brg. Co., Frostburg, Ind.	2
"	"	Park Brg. Co., Providence, R. I...	1
Nov.	"	F. W. George & Co., New York, N. Y.....	1
Oct.	"	Park Brg. Co., Providence, R. I...	1
"	"	Isengart Brg. Co., Troy, N. Y.....	5
			975

(Signed) ECH. [96]

SALES OF 1912 CROP COSUMNE HOPS MADE AFTER NOV. 4th, 1912.

Date of Sale. Month.	Year.	Sold to	B/—
Nov.	1912.	W. P. Downey	3
"	"	F. Steil Brewing Co	50
"	"	Park Brewing Co	5
"	"	Springfield Brg. Co	98
"	"	F. W. George & Co	1
"	"	Narragansett Brg. Co	100
"	"	S. F. Rothaker Brg. Co	25
"	"	Gutsch Brg. Co	3
"	"	C. A. Pulkrabek	1
"	"	J. & M. Haffen Brg. Co	25
"	"	Medina Brg. Co	5
"	"	Geo. Cooke Brg. Co	10
"	"	Florida Brg. Co	10
"	"	F. W. George & Co	10
"	"	F. Sandkuhler	1
"	"	Park Brewing Co	15
"	"	F. W. McGowan	5
"	"	Boston Beer Co	50
"	"	Eastern Brewing Co	20
"	"	J. Kuhlmann Brg. Co	10
Dec.	"	A. Bruyndonckx	1
"	"	F. W. George & Co	25
"	"	Lauer Brg. Co	5
"	"	Centerville Brg. Co	6
"	"	Consumers Brg. Co	5
"	"	Henderson Brg. Co	20

Date of Sale. Month.	Year.	Sold to	B/—
"	"	Medina Brg. Co	15
"	"	F. W. George & Co	2
"	"	Jos. Haefner	92
"	"	S. S. Steiner	44
"	"	Jefferson B. & M Co	4
"	"	Mobile Brewing Co	20
"	"	Silverton Brg. Co	6
"	"	Centlivre Brg. Co	10
Jan.	1913.	Frostburg Brg. Co	3
"	"	Sutherland & Co	50
Feb.	"	Geo. Cooke Brg. Co	15
"	"	Manhattan Brg. Co	52
"	"	Frostburg Brg. Co	8
"	"	J. Camu & Fils	50
"	"	Smith & Capron	25
"	"	L. D. Jacks	65
Jan.	1913.	Cleveland Sandusky B. Co	97
"	"	Aurora Brg. Co	85
"	"	S. S. Steiner	33
"	"	C. H. Atz	6
"	"	S. S. Steiner	91
"	"	F. Staemele	2
"	"	H. Werner	1
"	"	Menasha Co.	1
"	"	Smith & Capron	42
Mar.	"	Altoona Bgr. Co	15
"	"	Yale Brg. Co	35
"	"	Allegeir Brg. Co	2

(Testimony of E. C. Horst.)

Date of Sale. Month.	Year.	Sold to	B/—
"	"	Johnson Brg. Co.	25
"	"	Cataract Consumers	10
"	"	J. L. Hopkins & Co	2
"	"	Bauer-Schweitzer H. & M.	5
"	"	McHenry Brg. Co	1
"	"	Centerville Brg. Co	6
Apr.	"	E. L. Husting	1
"	"	A. Hupfels Sons	38
"	"	Vogl's Indep. Brg. Co.	1
May	"	Atlas Brg. Co.	3
"	"	Atlantic City Brg. Co	10
"	"	E. H. Gamble	5
June	"	Lykens Brg. Co	8
"	"	Stroudsburg Brg. Co	5
July	"	Yake Brewing Co	3
			1503
		Delivered on Claims	37
		Cut up	2
		Delivered on "Pick Outs"	169
			1711

(Signed) ECH. [97]

WITNESS.—There is something wrong about the statement.

Mr. POWERS.—I prefer to argue the case myself.

(Testimony of E. C. Horst.)

The WITNESS.—It does not mean sales but means deliveries of Consumnes hops. We sold Pacific Coast hops and then we delivered the Consumnes; but the sales were not all Consumnes River hops.

Mr. POWERS.—I offer it for what it is worth.

Mr. DEVLIN.—It is not admissible with the explanation of the witness. He says he sold Pacific Coast hops but in filling the order for Pacific Coast hops he would fill it with Consumnes hops. Therefore that does not bear upon your point at all.

The COURT.—Mr. Powers is simply offering it for what it is worth.

Mr. POWERS.—At the former trial did you testify as follows on page 306:

"Q. Show me an entry as to where the other goods went out, other than the other goods you have given us here.

The WITNESS.—I can give you this information as well as anybody else. Joseph Schlitz Brewing Company, 100, lot 542, on August 30th. That does not necessarily mean the day it was shipped. It simply means the day we expected to ship them.

Q. What is the next entry?

A. The next is the same day, Joseph Schlitz, 100 bales, lot 453. That is August 30th. On September 10, Schlitz, 100 bales. September 10th, Schlitz, another 100 bales. Lots 455 and 456. One bale, lot 457. Same date, one bale, lot 458. Same date, 100 bales, lot 459. On September 14, Schlitz, 100 bales, lot 501; on the same date 100 bales, lot 502. Same

(Testimony of E. C. Horst.)

date, lot 502, 100 bales; 100 bales, lot 503; 100 bales lot 524; 100 bales, lot 505; September 23, Gottfried Brewing Company, Chicago, 100 bales, lot 463. September 30, Peter Barman, Kingston, one bale, lot 451. September 30, Kennewah Brewing Company, Charleston, 5 bales, lot 451. September 30, Kittaning Brewing Company, 5 bales, lot 451. October 4, Wooster Brewing Company, 100 bales, lot 507. October 9, Liebert, Philadelphia, 5 bales, lot 451. October 9, Stanton, Troy, 4 bales, lot 451. [98] October 12, Graff, one bale, lot 454. October 12th, Hinkley, Philadelphia, 4 bales, lot 518. October 14th, Cook, Chicago, 10 bales, lot 454. October 17th, Citizen, 5 bales, lot 454. October 17th, Eastern Brooklyn, 20 bales, lot 451. October 17th, Florida, Tampa, 5 bales, lot 451. October 22d, Cambrinus, Chicago, 5 bales, 454. October 22d, George, New York, 10 bales, lot 451. October 25th, Zoloski, 5 bales, lot 454. October 31st, Bayton, 100 bales, lot 466; 99 bales, lot 467; 100 bales, lot 468; 1 bale, lot 454; October 31st, United States Brewing Company, Chicago, 100 bales, lot 508. October 31st, United States Brewing Company, 96 bales, lot 510. October 31st, George, New York, 1 bale, lot 451. October 31st, Kenawha, 25 bales, lot 454. October 31st, Bellair, 15 bales, lot 454."

Mr. POWERS.—Q. Now, Mr. Horst, you were mistaken, then, when you say that the Schlitz hops were accepted after Pabst rejected, were you not?

A. The Schlitz accepted 1200 bales of the earliest pick from the two ranches—they accepted 1200 bales.

(Testimony of E. C. Horst.)

Q. They were shipped to him in August and September, were they not? A. Yes.

Q. So they were rejected before November 4th?

A. By Pabst?

Q. By Schlitz.

A. Schlitz never rejected any Consumnes hops. [99]

Q. You made him an allowance on 200 bales, did you not?

A. No, I don't know whether we made him any allowance. They never rejected any of the hops. I was very careful to look at my books since the adjournment, and Schlitz accepted all of the Consumnes hops that we shipped him, 1200 bales.

Q. At the former trial, did you not testify that you made an allowance to Schlitz on 200 bales?

A. Perhaps I did. I don't remember definitely.

Q. On page 130.

"The COURT.—Take the Schlitz transaction. That was a transaction calling for 1500 bales. There were some rejections, you said? A. Yes.

Q. They claimed a rebate and took 1200 bales?

A. Yes.

Q. You allowed a rebate on 200 bales? A. Yes.

Q. They kept 200 bales but asked a rebate?

A. Yes. I cannot say any more than that I offered to take the hops back and they said as they had them in their brewery they would rather keep them there and have an allowance on them. I made them allowance as a matter of policy."

Did you so testify at the former trial? A. Yes.

(Testimony of E. C. Horst.)

"Did Gottfried demand a rebate, also?

A. Gottfried?

Q. Gottfried Brewing Company?

A. I tell you, the Gottfried Brewing Company demanded a rebate on everything, every shipment.

Q. But they did demand a rebate?

A. I presume everything that was ever shipped Gottfried, they demanded a rebate. That will cover that answer—anything ever shipped to Gottfried they demanded a rebate.

Q. But they did demand a rebate?

A. I don't recall offhand on any particular lot.

Q. Did the United States Brewing Company reject some bales prior to November 5th?

A. Yes. I have a distinct memory that we had over 3,000 bales of hops on hand at the time that Pabst rejected. I know that.

Q. Where were these bales? How do you know there were 3,062 instead of 3,015?

A. I don't know whether there were 3,062 [100] or 3,061, but I know there were over 3,000 bales.

Q. Where were they?

A. They were here on the coast.

Q. How many?

A. I don't remember the figures offhand now except in an approximate way.

Q. But you can find them from the books, can't you? A. Yes, I can dig that all out.

Mr. POWERS.—I move, if your Honor please, that the testimony with reference to the 3,000 bales

(Testimony of E. C. Horst.)

be stricken out on the ground it is not the best evidence.

Mr. DEVLIN.—He says he knows.

The COURT.—I do not understand you, Mr. Powers. You have been calling for it on cross-examination. Are you asking to have it stricken out now?

Mr. POWERS.—I mean direct testimony. He said he had 2,000 bales available, and the reason he had 2,000 bales was because he knew he had 3,062. I move all of the testimony of the witness with reference to the Consumnes hops he had on hand available to be delivered be stricken out, because it is not the best evidence.

The COURT.—The motion will be denied.

Mr. POWERS.—Exception.

EXCEPTION No. 8.

In 1912, we sold Schlitz 1,500 bales; the contract called for choice or choicest Pacific Coast hops. I don't remember which, and therefore we could deliver hops from any district. 1,200 of the 1,500 bales delivered were Consumnes hops, and the remaining 300 bales were from other districts. On November 4, 1912, we had on hand 3,000-odd bales of choice Consumnes hops. There were about 1,300, or 1,400, or 1,500 bales on the Coast. I am giving you just offhand figures—and about 400 in Milwaukee; about 600 in New York; about 500 or 600 in transit, something in that [101] neighborhood, and the total made over 3,000 bales.

(Testimony of E. C. Horst.)

Q. Are you testifying from a memory of those facts, or from records that you have?

A. Well, for those particular figures that I am giving now, I read over the testimony that I gave on the former trial.

Q. That testimony is based upon figures that were based upon your books, is it not?

A. Of course at that time, when I gave the testimony before, then I knew the figures; then the situation was comparatively new, but now I base my present statement upon reading the testimony on the former trial.

Q. At the former trial didn't you testify that you had to go to your books in order to get that information?

A. I had to go to my books to get exact figures, but in a general way I knew the figures without the books —I knew them at that time.

Q. As a matter of fact, weren't 300 bales that you gave as being in transit actually sold and delivered at that time?

A. No. We were very careful to check up the record with anything we gave you in transit, that it was not at that time delivered.

The COURT.—I certainly think with a little consideration this trial can be considerably shortened. It seems to me that any evidence that went in at the former trial might be stipulated correct here, and supplement it by such additional testimony as either side wish to introduce.

Mr. POWERS.—If your Honor rules against me

(Testimony of E. C. Horst.)

on the proposition of where these 3,062 bales were—

The COURT.—How do you mean ruling against you as to where they were?

Mr. POWERS.—As to striking out the testimony of this witness' memory, when it was based on books.

The COURT.—I cannot accede to your suggestion that it is based on books. He has just repudiated that a moment ago. [102]

Mr. POWERS.—He said about, and he gives now the figures.

The COURT.—He has testified here within five minutes that his present testimony is given by refreshing his memory as to what he testified to before; but his memory at that time was refreshed as to the substantive facts, that he had that quantity of hops on hand either here or in transit, or in Eastern points; that he had to go to his books for the specific figures, which, of course, one would assume that it would be necessary to do, but that he knew in a general way the quantities and location of those hops. That is not a dependence upon the books.

Mr. POWERS.—I will return to the testimony and show that at the former trial he also said he could not give it except from his books; we spent five days getting it from the books at that time, and showed that he at that time had to refer to the books, and he is refreshing his memory now from that testimony, and that testimony came from the books, and therefore we are now having all of this trouble because he does not produce the books.

(Testimony of E. C. Horst.)

The COURT.—Has he been asked to produce the books here?

Mr. POWERS.—Yes.

The COURT.—Have you refused to produce your books here?

A. No.

The COURT.—Where is there any notice to produce his books here. When was it served?

Mr. POWERS.—It was served upon his attorneys Monday.

The COURT.—This week?

Mr. POWERS.—Yes.

The COURT.—Why don't you give notice of what you want before the trial, so that they could bring them here?

Mr. POWERS.—Because the books were here at the former trial, and I supposed they would be here at this trial.

The COURT.—Have you asked for them? [103]

Mr. POWERS.—I have asked for them.

Mr. DEVLIN.—The books came up Monday night.

Mr. POWERS.—All day yesterday I wanted to see the books and they would not let me see them.

The WITNESS.—They are at the hotel, and you can go and look at them so long as you please.

The COURT.—We had the same sort of controversy before, and it turned out, according to my observation, that you were afforded an opportunity to see those books.

Mr. POWERS.—Here is what happened: Mr. Horst showed me an invoice book and tells me he

(Testimony of E. C. Horst.)

can't find the sales-book. It is the sales-book I want, and the record of the warehouse. Neither of those are given to me. Were they given to me, Mr. Horst?

A. I will tell you what I gave you: You wanted to know what happened to every bale of Consumnes hops, and you and I went through every invoice, through all our invoice books, and you picked out the disposition and the date of disposition, and the buyer's name, and the place, and I gave you the entire list, and you kept that list, as soon as you got it yesterday, until this morning, and I have that list here, and it shows conclusively that there were over 3000 bales of hops on hand on the 4th of November; you have got the full data here.

Mr. POWERS.—Where is the sales-book of the Horst Company?

A. The sales-book is the book that I could not find. I brought up the invoice-book.

Q. Can you from that book after recess tell where each of the lots of hops were on November 4th?

A. It will take a couple of days to make up a compilation.

Q. Can you tell us what date they reached New York?

A. I couldn't tell you the exact date they did reach New York; I would have to hunt up my bills of lading and railroad records of all that, but I can show you the movement of every lot of hops, [104] from the time that the hops were bales until they were finally disposed of.

Q. Can't you tell whether that 600 bales was in

(Testimony of E. C. Horst.)

New York prior to November 4?

A. No, I can't tell from this book the actual date of arrival. I can tell you the date that the lot was ordered and when the lot was invoiced, and I can give you the invoice number for it, and what sale it applies to; I can give you all of that data, but I cannot give it to you now.

Q. How long would it *to* take to get that up?

A. To make up a paper of that sort?

Q. Yes.

A. It will take all of a month if you want exact date; I would have to trace the railroad record of every lot of stuff until it got to the destination; then I would have to trace the warehouse records, get the warehouse receipts and find the date that they went into the warehouse; then I would have to get the date when it went out of the warehouse.

Q. How do you know that you actually had 3,062 bales available on November 4th?

A. I know from this list here that you and I made up yesterday that I had over 3,000 bales. Invoice number 1077, referring to lot 509, were made up in the New York office. That invoice was made up from deliveries; but I was not present; I know the man got the hops and paid money for it.

The COURT.—That would be inferential knowledge. That is, you would assume, in the ordinary course of things a man would not receive a lot of hops and pay for them unless the fact was as represented there, but actual knowledge is a different thing.

A. I have no knowledge.

(Testimony of E. C. Horst.)

Q. You assume, of course, that these things are true, because they are done, as you say, in the ordinary course of trade. Counsel is asking you if you actually knew it, and of course you did not.

A. No.

Mr. POWERS.—Q. Where is the sales-book you had in court before?

A. I don't know where it is. [105]

Q. Where did you last see it? A. At the trial.

Q. Do you remember Mr. Farrel making up some figures from that book showing the total number of bales that have been shipped out in accordance with that book prior to November 4, 1912?

A. I remember all sorts of statements being made at that time but I don't remember that particular statement.

Mr. POWERS.—Q. Those 233 bales that were en route, however, are bales that had been sold prior to November 4th?

A. It depends upon the interpretation you put upon the word "sold"; they were used against sales that had been made prior to that time. That does not mean that they are sold.

Q. But they were invoiced by you prior to that time?

A. That does not make any difference; they were applied against sales, and until the brewer accepts a lot of hops they are our hops; we can do with them what we please; after the hops get to destination, and before the brewer accepts them, we can ship them somewhere else if we want to use them.

(Testimony of E. C. Horst.)

Q. But you had invoiced them and shipped them to these parties yourself?

A. We had invoiced them but kept possession of the goods.

Q. How many of those were returned, that is by the brewers?

The COURT.—You mean returned or rejected?

Mr. POWERS.—Returned to him.

The COURT.—I do not see how the term "returned" could apply, when he says they do not deliver them until they are accepted.

Mr. POWERS.—Q. How many of the bales tendered were returned?

The COURT.—"Rejected," he means.

A. I cannot tell you that offhand. All I can tell you is that of the 4,478 bales there were 1500 or a little less than 1,500 that were delivered prior to November 4th, and there were over 3,000 bales on hand on November 4th. [106]

Q. (Intg.) At the former trial there were 3,062 bales. Of those 1,503 you considered to be for Pabst, 497 were sold on former contracts which you said you would give Pabst the benefit of, and then there were 1,062 on former contracts that Pabst was not given the benefit of. Now with reference to the latter class of 1,062 bales, they were all sold at prices in excess of 20¢ a pound, were they not?

A. They were sold at prices in excess of 20¢, but long before November.

Q. But in excess of 20¢ a pound? A. Yes.

Mr. POWERS.—On that point I wish to call the

(Testimony of E. C. Horst.)

Court's attention to the fact that Mr. Horst had contracts made the year previous for 35 or 36 cents, and he applies on those contracts hops when the market price was 14 cents.

The WITNESS.—You are wrong, because we did not sell any Consumnes hops that year to anybody, choice Consumnes hops, except the Pabst Brewing Company. All our other sales were Pacific Coast hops, so that we could deliver hops from any district of the Pacific Coast against the sales, and none of those 1,000 bales that you are referring to were sales of Consumnes hops.

Q. But you did apply 1062 bales on the contract?

The COURT.—Yes, but he said he was not required to; he could fill them with any other district's hops.

Mr. POWERS.—The application *of* these hops was made before November 4, 1912?

A. No. It was made after November 4th.

The COURT.—What do you mean by making application?

Mr. POWERS.—Q. I mean you had tendered the samples to the various purchasers?

A. No. In a good many instances Consumnes hops were available to be delivered under a contract providing for as good as Oregon hops.

Q. (By Mr. POWERS.) So that the price of Oregon hops was practically [107] the same as Consumnes hops at that time?

A. The price of Oregon hops at that time ran from 10 to 12 cents. 10 to 12, I think; the outside was

(Testimony of E. C. Horst.)

about 14; we bought lots of them for 10¢; on the 4th of November we bought Oregons at 10¢.

Q. You did?

A. Yes, Oregon hops from 10 to 12. I have got my purchase book here.

Q. You bought choice Oregon hops for 10 to 12 cents? A. Yes.

Q. Before November 4th? A. Yes.

Q. From whom?

A. We bought them from T. A. Lively & Company.

Q. Choice Oregon hops? A. Yes.

Q. Will you turn to the book and give me those that you bought at that time?

A. There was a range of prices.

Q. Oregon hops that year.

A. Here is a purchase on November 25th, 13½¢.

Q. Were those choice Oregon hops? A. Yes.

Q. Were the Oregon hops that year choice hops—most of the Oregons were medium and prime, were thy not? A. There were plenty of choice hops.

Q. And those particular hops were choice hops?

A. Yes.

Q. Go ahead. A. 43 bales, December 2, 12½.

Q. Choice Oregon hops? A. Yes.

Q. From whom?

A. A man by the name of Christensen.

Q. What did you do with those hops?

A. Delivered on choice sales.

Q. For how much?

A. Those hops were sold over in England at about 24 cents a pound. [108]

(Testimony of E. C. Horst.)

Mr. POWERS.—Will you, during recess, make up a record of where your hops were in the warehouse in November, 1912?

A. If you want the exact date, it is going to take a month—it will honestly take a month to figure it. I have got the approximate dates here.

Q. Give us the approximate dates. A. All right.

Mr. DEVLIN.—You had all that in the former trial.

Mr. POWERS.—We did not get that until last Monday.

Mr. DEVLIN.—I am willing to concede that all of the testimony given on the former trial be considered in.

The COURT.—I am sure that was all gone over in the former trial.

Mr. POWERS.—We had the same controversy, and I was unable to get it.

Mr. DEVLIN.—We had Mr. Lange here, the bookkeeper for Mr. Horst, and they had Mr. Farrel, an expert, go over the books, and Mr. Farrel testified.

Mr. POWERS.—Let us introduce the warehouse book records and we can work it out ourselves.

Mr. DEVLIN.—All right. Give him a copy of the records of the warehouse.

Mr. POWERS.—Let me have them so that I can check them over and introduce them.

Mr. DEVLIN.—The point Mr. Horst makes is that the exact date they were in the warehouse, and taken out, is not exactly shown. Mr. Horst says if you

(Testimony of E. C. Horst.)

want that it would take a month to figure out the information.

Mr. POWERS.—If you will give me the records of the warehouses of the 1912 crop, I think we will be able to arrange it and thereby curtail the testimony.

Mr. DEVLIN.—We have had a little consultation between counsel during the recess, and I think we can agree upon the testimony as to quality, I mean as to the evidence in the former case. We can agree, I think, that the testimony of the witnesses who testified in the former case on the part of the plaintiff so far as relates to the quality of the hops, shall be considered as given in this case. [109]

Testimony of T. L. Conrad, for Plaintiff.

T. L. CONRAD, called as a witness on behalf of plaintiff and sworn, testified as follows:

Direct Examination.

(By Mr. DEVLIN.)

I reside at Wheatland and I am in the employ of the plaintiff as superintendent. I have worked for the plaintiff eighteen years. I worked for it in the Consumnes district in Sacramento County from 1905 to 1915. For that ten years I was superintendent of its Consumnes Ranches.

I have been around hops all my life, practically ever since I was a boy; I took charge of the Consumnes Ranches in 1905 for Mr. Horst, and I have been handling them ever since until this year, and I have been engaged in picking and curing and superintending the picking and curing of hops for four-

(Testimony of T. L. Conrad.)

teen years. That is the only business I ever had. Before I went to the Consumnes River and took charge of the Horst Ranches, I had worked for the Horst Brothers at Perkins. I am familiar with the country out in the Consumnes River district, adapted to the growing of hops, and with the different ranches in that vicinity. In what is known as the Consumnes district, I think there are about a thousand acres—there were in 1912. I don't know how many there are now.

I had charge of the picking and curing of the 1912 crop of hops of the E. Clemens Horst Company; also the crop of 1911 and the year prior to that. In picking and curing the hop crop of 1912 in the Consumnes district, we took the greatest care that we could; we always try to keep them as clean as we can, and we picked them as clean as anyone, or better than some people did. They were picked clean. They were picked by machinery. We separated any that were not picked clean from the others. The stuff that was not as clean we kept separate and baled separately. If I remember right, there were about 4,300 bales of the cleaner [110] picked hops and 200 bales that were not cleanly picked, making altogether about 4,500 bales.

I saw the hops when they were put in bales; I saw them from the time they were strung up until they were shipped. In curing these hops, the air-drying process was used.

I examined the 1912 hops. I was superintendent of the ranch and superintended the picking and curing and bailing of the hops.

(Testimony of T. L. Conrad.)

Concerning the quality of hops grown on the Horst ranch in the Consumnes district in 1912, I would say they were choice hops. As compared with the 1911 crop of the same company in the same district, they were practically the same, or perhaps a little better.

Samples 1 to 20, now exhibited to me, I have seen before. I put my initials on them. They were choice hops.

Cross-examination.

(By Mr. POWERS.)

When I say there were 4,300 bales of clean picked hops—I had two plants there and I was back and forth between the plants all the time. Of course I did not supervise the baling of each bale. I could not be at the baling of every bale. With reference to the number of bales, I referred to my own record. I kept a record of all of them.

There were 4,500 bales raised that year.

The method of picking these hops with the machine is that the picking-machine is constructed of drums and sprockets and they drive up to the end of the machine with a wagon and they have what they call a vine cutter, and they go through the machine and the hops drop down on the separators—it is very seldom the experience that leaves drop with the hops. I don't think that any body else in the Consumnes district used the machine in 1912 except the Horst Company; I don't remember. The machine method of picking [111] is much cleaner than the hand-picking. There has not been much improvement made in this respect since 1912. There has been a

(Testimony of T. L. Conrad.)

little. There have been a few changes year after year, as far as that is concerned. The hops in 1914 or 1915 were not any cleaner than those picked in 1912. [112]

Testimony of F. W. George, for Plaintiff.

F. W. GEORGE, called as a witness on behalf of plaintiff, sworn, testified as follows:

Direct Examination.

(By Mr. DEVLIN.)

In 1912 I was a hop dealer in New York, and at present am working for Mr. Horst. I started in for myself about 1911 and continued for four or five years dealing in all kinds of hops and was acquainted with California hops and hops grown in the Consumnes District. My place of business was 200 Fifth Avenue in New York. In 1912 I sold all over the United States, Chicago, New York and Canada. Part of my business was to become familiar with the market prices of the various kinds of hops, and I made efforts to ascertain from other dealers what hops were being sold for in the market. I know where the Consumnes district is in Sacramento County. I myself bought choice Consumnes hops in the year 1912 in November from plaintiff and afterwards sold them. I bought them on the samples. They were choice Consumnes hops. I sold them as choice Consumnes hops in the regular course of trade. I think I made a number of purchases; on November 13th I purchased I think one lot of about 100 bales. I think I purchased on about the 20th of

(Testimony of F. W. George.)

November ten or twenty bales. I have not refreshed my memory as to what I bought at a later period.

Q. Now, did you know the market price of choice Consumnes hops in Milwaukee in the month of November, 1912? A. Yes.

Q. What was the market price?

A. I would take the market price for the price I paid for them.

Q. What was it?

A. I paid 13 cents delivered. The market price was 15 cents delivered in Milwaukee; that would be 13 cents in California. I paid 15 cents or 15¼ cents; I am not positive which. I am speaking now of November 13, 1912. Between that and January 1, 1913, I think they declined somewhat; it was a dead market; there was not much doing. On December 1, 1912, I would say that the market price of choice Consumnes hops [113] in Milwaukee was about 16 cents delivered,—15½ to 16 cents.

Q. Are you able to state what the market price was in January?

A. No, I have not refreshed my memory from that period on. There is not in Milwaukee or any other place in the United States an exchange maintained for the sale of hops. They are sold by personal solicitation. The universal method of their sale is either by mail or in person.

Q. If you had a quantity of 2,000 bales of hops to sell in the East in Milwaukee, what would be a reasonable time to dispose of those hops at the market price? Could you expect to sell 2,000 bales of choice

(Testimony of F. W. George.)

Consumnes hops at Milwaukee at the prices then prevailing in thirty days?

Mr. POWERS.—We object to that as immaterial and irrelevant, and addressed to no issue in this case; conjectural, argumentative, and as confining it to Milwaukee: The market value in Milwaukee is to be determined by the market value throughout all the cities that are similarly situated—Chicago, St. Louis, New York and the rest of them.

Objection overruled and exception.

EXCEPTION No. 9.

A. No.

The COURT.—What would be your answer to that if the question [114] were to confine it to the Eastern market, instead of Milwaukee alone?

A. I would say that it would be a very difficult matter to sell 2,000 bales of hops under the condition that existed at that time, a lifeless market; the market was inclined to go down; they do not buy on declining markets as a rule any more than they have to. I would not think it would be an easy matter to sell 2,000 bales of hops in 30 days. At Chicago, or New York, or the entire East.

(By the COURT.)

Q. How long would it take to sell 2,000 bales of hops from and after November 4, 1912, either at Milwaukee, or Chicago, or New York?

Mr. POWERS.—If your Honor please, our objection and exception went to the question as modified, too, and the answer? I did not specifically object.

The COURT.—Yes.

(Testimony of F. W. George.)

It would be a mere guess to say how long it would take to sell 2,000 bales in Milwaukee and vicinity. It might take a long time, a month.

Q. What was the market value of 2,000 bales of choice Consumnes hops at Milwaukee or thereabouts in November, 1912?

Mr. POWERS.—We object to that as irrelevant and immaterial.

The COURT.—Yes, I think so. That is the same question that came up yesterday. They are controlled by the market value of hops.

The COURT.—You see, Mr. Devlin, a rule of damages is, in the nature of things, intended only to be an approximation, as near an approximation as you can reach. There are frequently circumstances which would very materially affect a rule, but you have got to have a certain method of establishing the rights of a part, under a given state of facts. Now, then, that has been determined to be in this instance the difference between the contract price and the market price. That means the prevailing general market price at the time involved; it does not mean a market price affected by some accidental consideration such as quantity, or anything of that [115] kind, which would introduce too speculative and uncertain a feature into the rule.

Cross-examination.

(By Mr. POWERS.)

Mr. George, do you know of any sales in or about Milwaukee on November 4, or thereabouts, in 1912?

A. No.

(Testimony of F. W. George.)

Q. Not in Milwaukee or thereabouts in 1912?
Q. Do you know of any sales in Chicago on or about November 4, 1912, of choice Consumnes hops?

A. No. I know the firm of Falk Wormser & Co. of Chicago. They are large dealers in hops.

Q. If you were informed that Falk, Wormser & Co. actually sold in the neighborhood of 800 bales of Consumnes hops in November, 1912, for prices ranging from 21 to 23 cents to brewers, would that affect your opinion as to the market value of hops in Milwaukee? A. No.

Q. What is the firm that Mr. Schumacher is connected with? A. Magnus & Co. [116]

Q. If it were to be established that Magnus & Co., Chicago, sold hops to brewers, choice Consumnes hops to brewers in an amount in excess of 600 bales during the month of November, 1912, for prices ranging from 22 to 24 cents, would that change your opinion as to the market value of hops in Milwaukee?

A. I am judging my opinion of the value by what I sold them at, myself.

Q. Then you did not take into consideration the range of the rest of the trade?

A. We always keep posted on the trade, what they are selling at.

Q. Did you keep posted on what the sales of Consumnes hops were? A. As well as I could.

The COURT.—Are there market quotations, at all? A. They aré very unreliable.

Q. But are there market quotations?

(Testimony of F. W. George.)

A. There are quotations in newspapers.

Q. You keep abreast of those, do you?

A. Yes.

Mr. POWERS.—Q. Did you look at the Brewers Journal—do you recognize the Brewers Journal of Chicago as a trade journal?

A. I recognize it as a trade journal, but not as a trade price.

The COURT.—A trade journals for brewers?

A. Yes.

Mr. POWERS.—Q. Were you familiar with the price quoted by it during that time?

A. I could not from memory now tell you what prices were quoted at that time, but I read the "Brewers' Journal," the Bulletins under hops, and I was familiar at the time with the quotations therein contained. I found them quoted wrong most all the time.

Mr. POWERS.—With reference to the price of Oregon hops, were Oregons selling more freely than Consumnes? A. Yes, I believe so.

Q. How much more was [117] Oregons selling than Consumnes?

The COURT.—What are we interested in that for?

Mr. POWERS.—I am going to test his quotations and his memory.

The COURT.—You cannot go into outside inquiries for that purpose; that is an immaterial inquiry. You can test his memory as to the material features affecting this case.

(Testimony of F. W. George.)

Mr. POWERS.—Exception.

EXCEPTION No. 10.

Mr. POWERS.—Q. Now, then, what did you do with the hops that you bought?

A. Sold them to the Narragansett Brewing Company for 16 cents. That was because of the state of the market. [118]

WITNESS.—(Continuing.) I have been employed by plaintiff for a year and a month, and I have been employed by him about seven or eight years. I was not employed by him in 1912. My brother was. Mr. Horst's wife is a cousin of mine. We are on intimately friendly relations. I have helped him to prepare the case very hastily. I have not had anything to do with this case until two days ago.

It was stipulated that the following testimony given at the former trial as to quality of hops should be considered in evidence.

Testimony of E. C. Horst, for Plaintiff.

E. C. HORST, sworn, testified as follows:

Q. Will you state whether or not the hops that you grew on your place in 1912, were or were not choice air-dried Consumnes hops? A. Yes.

Q. State whether you were able or not to deliver out of the 4,300 bales you have specified, the 2,000 bales of hops for the purpose of filling this contract for the Pabst Brewing Company?

A. Yes. The samples sent to them were choice air-dried Consumnes hops and they were from these bales. If you take California hops, you have got to start in with the hop-drying floor. That is the only place that you can tell the difference between air-dried and kiln-dried hops, if they are equal of picking. Buyers see samples in their counting-houses.

(Testimony of E. C. Horst.)

Q. In that place it would be impossible to pick out which was kiln-dried and which was air-dried?

A. It depends upon the amounts of leaves in each. You have got to start in with the same class of hops, and then after you run them through the drying process, if you start in with the same class of hops, and then you dry them at different temperatures, or you use different methods of handling, then you see in the resultant sample a different rate of cleanliness.

Q. If you are shown two samples of hops in a counting-house in Chicago or New York, you would be unable to say which was a kiln-dried or which was an air-dried hop, according to your process?

A. No, I could not be sure of it. (93) With the exception of 150 bales, all the rest of the bales are of equal grade. They were all choice grade, every bale. One bale was substantially as good as the other. They were not of the same kind. They [119] varied.

Q. Well, they were all of the same kind, were they? (96)

A. No, not of the same kind. They varied. We did not pick them all the same day. You are picking hops about three weeks, and the hops you are picking the first day are not identical with the hops you are picking the second day.

Q. They are choice?

A. They were choice, yes.

Q. They were all of the same degree of choiceness?

A. Yes. But they were all of the same degree of choiceness. [120] There was no rain during the time we were picking hops. We were one of the few people that got through before the rain. It took about three or four weeks to pick about 4,500 bales. We used a machine. We started in picking the

(Testimony of E. C. Horst.)

ripest first, then went along and by the time we got them picked, the hops were no riper at the end than the hops we started to pick at the beginning. The hops you pick in the early part of the season sometimes are green, but not always. It sometimes happens that the hops you pick on the first day are the ripest, and the greenest hops you pick on the last day. The conditions being the same on our land as the conditions on other people's land, our hops ripen substantially as other people's ripen. Choice hops are the best hops in the district that you refer to.

Q. What are the qualities of a choice Consumnes hop?

A. Soundness, properly cured, cleanly picked, good color, freedom from disease, freedom from mould, freedom from any form of damage. Lupulin also plays a part. It is grown in the hop and whether or not it is, is determined by looking at it. Our contract provides for 2,000 bales of Consumnes air-dried hops. We were the only persons who grew air-dried hops.

Q. Then according to your interpretation of that contract, the best of that crop during the year 1912, would have to be accepted by Pabst in compliance with your contract, whether they were choice hops or not?

A. If the hops were sound, if the hops had no faults. I would not intend if the hops were dirty, or the hops were damaged, or poorly dried or picked, or bad in any other way, that they would be choice hops.

(Testimony of E. C. Horst.)

Q. They had to be the general quality of choice Consumnes hops?

A. Choice air-dried Consumnes hops.

Q. Air drying and kiln drying both produce a hop, but they are simply different methods of preparing them for market. [121]

A. When you get right down to it one hop is as good as another hop for brewing. You simply put them on a market, and you give a man what he wants. Air-drying refers to the process by which the hop is cured.

Q. When you speak about air-drying it provides for the manner in which the crop is cured?

A. It refers to the manner of curing the crop.

The COURT.—In other words, air-drying does not refer to the particular character of the hop that is grown? A. No, sir.

Q. It simply refers to the mode or method or manner of curing it? A. That is all.

We do not get a higher price for air-dried than we do for kiln-dried. After I sent the wire to the Pabst people reading, "If you wire you will accept the hops quality samples you send, we will arrange accumulate such hops for you," I received the four samples marked 21, 22, 23 and 24. Two came in one mail and two came the next day. I subsequently shipped them samples of hops thus marked 25 to 38, that I considered to be in conformity with these four samples of hops.

Q. When is a choice hop to be rejected because of

(Testimony of E. C. Horst.)

the manner of picking so far as it being dirty or clean?

A. When there is an excess of extraneous matter, then it ceases to be choice. That is to be determined by any familiar with the hop growing. People who are competent to distinguish must use their own judgment as to whether or not the amount of extraneous matter present is sufficient to prevent it from being a choice hop. The grading of hops is like the grading of other commodities, such as wheat, and things of that kind, and with hops, the picking, packing and curing has a great deal to do with them. The Pabst people sent me the samples and then I matched them and tendered them the hops and they could not tell the hops thus tendered from any [122] other samples they had sent me. Machine-picked hops do not bring a larger price than hand-picked hops. We did not pick this crop of Consumnes hops extra early in order to fill that order. We started to pick on the 12th day of August, and we stopped picking on the 7th day of September. We picked only a few (107) hops the last few days of the season. I have got the detail of each day's picking. We do not weigh hops at all. We simply guess at what the weights are. This is green weight. It takes about three and a half pounds of green hops to make one pound of dried hops. All of those estimates there are in green weight. We picked between twenty-one and twenty-two thousand pounds on August 12th. That is 200 pounds of the 21,000 pounds. We picked off a few hops from the vines

(Testimony of E. C. Horst.)

after they had gone through the machine. On August 13th, we picked 49,000 pounds and 1075 pounds were picked by hand. The next day we picked 104,000 pounds. 2,400 pounds of those were hand-picked; there was another contract with the Manhattan Brewing Company, where we agreed to sell 100 bales of hops equal to or better than early choice California hops of 1912 at 27 cents a pound. (108) An expert could not form a fair and accurate opinion as to the quality of hops of 1912 by the samples now in the courtroom in their present condition, because the samples have aged and they are mussed up. The hops deteriorate with age and mussing hurts their general appearance, and you see the leaves more in a sample that is mussed up than you would otherwise.

Mr. DEVLIN.—Would the samples have to be kept, preserved in order to give the Court and the jury a fair indication of what the hops were two years ago that these samples were supposed to represent?

A. Samples should be kept tightly wrapped and properly handled and not mussed up. It makes them look poorer. Some of them have been split, that helps muss up the sample. In taking [123] samples you try to show the character of the hops. Hops are not uniform all through the bale as to leaves. There is a variety of hops called fancy, which is better than choice hops, but there is no such thing as a perfect hop. Samples one to twenty are the same class of hops as 21 to 24. They are mussed

(Testimony of E. C. Horst.)

up. Samples 25 to 38 are so mussed up that they would not enable an expert to judge with any degree of accuracy that the original condition of the hops was, because the samples are aged and have not been properly kept. We retained duplicate of the samples we sent to the Pabst Brewing Company. They are numbered the same. Hops taken out of cold storage would immediately deteriorate.

Q. If you were undertaking to pass upon the quality of hops of 1912, would you as an expert consider it fair to take samples of hops that have been kept in cold storage for eighteen months or so, taken out of cold storage and transmitted on a journey of three thousand miles in a railroad car and that have been handled from time to time, broken up and mussed up.

A. Samples kept under those conditions cannot be properly judged or fairly judged. The soundness of hops is produced by drying and curing. The factors which go to make up the value of a hop are the district in which it is grown, the time of picking, the proper picking as to the season, and the fatness and fullness of the hop. Its freedom from spider damage, its freedom from louse, and freedom from discoloration. Freedom from curing defects or [124] baling defects. Proper picking. Curing includes drying. It is impossible to get any hops that do not contain more or less leaves. Hops have volatile oils and these volatile oils with disappear with age. The word choice hop is an elastic term.

Q. What became of the remainder of the 3,062

(Testimony of E. C. Horst.)

bales you had on (198) hand on November 4th, 1912, after selling 2,000 bales on account to Pabst?

A. There were 150 bales or something like that of clean-ups and the balance were used by us for deliveries on prior sales of choice Pacific Coast hops.

The COURT.—He has said that before.

Mr. POWERS.—I want to get the price for which these were sold.

The COURT.—I think that is immaterial to this case.

Our claim is made up as follows: We took all of the sales of Consumnes river hops that we made, exclusive of the clean-ups, after November 4th. That made 1,500 bales, or a little over. That made a certain average price. Instead of putting the balance of the hops to make the 2,000 at that same average price, we put them in at the higher average price, being the lowest sales on the contracts. We had contract deliveries for a large quantity of hops. We had advance contracts for 20 or 30 thousand sales of hops, of Pacific Coast hops, but the average of the 1,500 bales, I put on those 500 bales at a price that we sold subsequent to November 4th. So instead of putting on 500 bales, on the average of the 1,500 bales. I put on those 500 bales at a price higher than the average was, so that there could be no question about the amount of damages.

Q. You mean that you allowed a higher average price?

A. Yes, than for the 500 bales, as against the 1,500 bales that was sold.

Testimony of E. C. Horst, for Plaintiff (Recalled).

E. CLEMENS HORST, recalled for direct examination by Mr. DEVLIN. [125]

Mr. DEVLIN.—After November 4th, 1912, how many bales of these hops that you call choice air-dried Cosumnes hops did you sell?

A. 1,503 bales. In my statement I gave Pabst credit for some 500 bales that were sold on prior contracts. I figured up the contract both ways.

Q. Were the prices that you gave him credit for on those prior contracts higher than the prices you paid for the 1,500 bales after November 4th?

A. I figured it up both ways. I figured it up on the basis of the same average, and on the basis of the higher average, for the 500 bales. The other 1,062 bales were delivered on contracts on which we already had a profit because of decline in the market on November 4th.

Mr. POWERS.—Q. Were those sales of the 1,062 bales made before November 4th, 1912?

A. Yes.

Where one grade runs into another is a doubtful point. There is a range between grades of hops. Pacific Coast hops are generally considered of better quality than Consumnes hops. It means the first average quality of the Pacific Coast, and a better quality of hops than if I sold to you choice Cosumnes hops. Because they have a wider range to pick from.

Mr. DEVLIN.—Q. The Pacific Coast quality raises the quality of the hop, where the Cosumnes

(Testimony of E. C. Horst.)

hop may lower the quality of the hop. The point here is whether Cosumnes hops as a grade of hops are lower or higher than the average Pacific Coast grade.

A. Cosumnes hops are the same grade—some Sacramento hops are low-grade hops, lower grade hops than Pacific Coast hops. Soil and climatic conditions. Russian River hops are considered very high, in the hop grade. [126] The highest grades are Yakimas, Russian River, then Oregon and Sonomas, then Western Washington, then Yuba County and Yolo County, are higher than Sacramento.

Testimony of W. J. Fielder, for Plaintiff.

Direct Examination.

(By Mr. DEVLIN.)

I reside at Perkins Station. I am superintendent of the hop ranches of the Horst Company. I have been connected with it since 1896, about eighteen years. I have bought hops, inspected and graded hops and grown hops. Everything connected with it in California, including the curing, selling and buying. I have had experience in Yuba County, Sacramento County and Sonoma County. I saw the hops samples 1 to 20 and 25 to 38. I also saw certain samples that were submitted by Mr. Horst in 1912, purporting to be splits of samples sent by him to the Pabst Brewing Company, of Consumnes hops. They were all choice Consumnes hops. The general pick and cure of a hop. Those that were submitted to me in 1912, were good choice hops. The condition was first class.

(Testimony of W. J. Fielder.)

Q. What do you understand a choice hop to be?

A. Good color, average color, and average clean pick. Lupulin good and plenty of it. The hops examined in 1912 came up to these conditions. They were both air-dried and kiln-dried hops. I have been superintendent of the American River ranches for four years.

Testimony of E. A. Zipfel, for Plaintiff.

E. A. ZIPFEL, called, sworn, testified as follows:

Direct Examination.

(By Mr. DEVLIN.)

I am a hop inspector and hop buyer, and at present am working for plaintiff and have been called upon to grade hops, to determine their quality. I have been engaged in that business for about twelve years. Hops have been bought on my judgment, after inspection. I am familiar with hops grown by Mr. Horst. I attend to the making of shipments for him. Choice hops are the best [127] average quality of any particular section. Choice hops of the Consumnes District are the best average quality of that district. There is a distinction between air-drying and kiln-drying. I have examined samples 1 to 20 and 25 to 38. They were choice hops. I am familiar with the hops that were raised on the ranch of plaintiff. We have certain lot numbers for so many bales. Merely as a matter of record. Plaintiff has several ranches and we give certain lot numbers to each ranch. For our own convenience in designating hops, we put 100 bales in a lot in general.

(Testimony of E. A. Zipfel.)

In that way we give a lot number and I can tell from which ranch the hops come, and these lot numbers are carried through our books. I saw the hops that the samples here shown were taken from. As an expert after a hop is two years old I cannot tell the condition so far as lupulin and fatness is concerned and the aroma. I am familiar with the splits of samples kept by plaintiff in this case. The other split was forwarded to the Pabst Company and at that time the condition of the hop was choice. They were cleanly picked, as that term is understood by the trade. There is no such thing as an absolutely clean picked hop.

It was thereupon stipulated on the part of the defendant that upon plaintiff's counsel stating that certain witnesses would testify to certain facts concerning the experience and capacity of experts that the witnesses would be deemed to have testified in the same manner as the other growers, and that defendant should be deemed to have the same exceptions and objections, and that the witnesses would be deemed to have the same experience and qualifications as the experts and no more than the grower witnesses who have already testified and that the defendant would have the same objections and exceptions to their testimony as not being expert. [128]

Thereupon Mr. Devlin offered the testimony of A. E. Murphy, who had examined five samples on October 23d, 1912; Mr. Bietzel, who had examined seven samples on October 23d, 1912; A. A. Merkley, who

(Testimony of E. A. Zipfel.)

had examined 26 samples; A. A. Hawk, who had examined 25 samples; Mr. Charles Colquhoun, who had examined 26 samples on November 26th, 1912; John Chipps, who had examined 25 samples on November 25th, 1912; George Zongley, 25 years' experience, who had examined 25 samples on November 26th, 1912; W. J. Castleman, 20 years' experience, who had examined 25 samples on November 26th, 1912; William Johnson, 23 years' experience, who had examined 26 samples November 23d, 1912; H. Gerber, 30 years' experience, who had examined 24 samples; A. T. Murphy, 2 years' experience in the Consumnes district, who had examined 25 samples on November 18th, 1912; William Fay, hop grower, ten years' experience in Consumnes district and American River District, who had examined 25 samples on November 18th, 1912; E. L. Kunz, 29 years' experience, who had examined these samples; W. L. Zednetter, 6 years' experience; P. W. Rooney, five years' experience; E. T. Rooney, five years' experience on the Consumnes, who examined samples; J. Calverhouse, five years' experience on Consumnes, who examined samples; B. B. Hoofer, 30 years' experience on the Consumnes; J. A. Crowell, 6 years' experience as hop-grower on Consumnes; J. A. Pond, 28 years' experience as hop-grower in Yolo County; J. Z. C. Lattin, 2 years' experience on American River and 10 years on the Consumnes; Anton Mento, 6 years on the Consumnes and Del Paso; George Minkey, 36 years at Mills, California, and on the American River; Methew Kennedy, 8 years' exper-

(Testimony of Paul E. Peterson.)
ience in the Consumnes; Ezra Castle, 10 years' experience on the Consumnes; Jacob Castleman, 20 years' experience on the Consumnes and at Perkins and in Yolo. [129]

Testimony of Paul E. Peterson, for Plaintiff.

PAUL E. PETERSON, called for plaintiff, sworn, testified as follows:

Direct Examination.

(By Mr. DEVLIN.)

I reside on the Consumnes River. I am a hop-grower. Have been in the business for twenty-five years. Have been engaged in Sacramento and Yolo Counties. My land is in the Consumnes District near the land of plaintiff. Am familiar with the supervision and caretaking of hops. First grew them in 1912. Did not see the 1911 crop. I have sold hops. Generally sell my hops as choice hops. I consider a choice hop to be one that is fully matured, fully cured, properly handled and not over ripe. There are some hops known as fancy hops. [130]

Q. Say out of 2,000 bales, would choice hops be the best bale out of 2,000 or the average bale?

A. It would be the average bale. I remember about a year ago last October that certain samples of hops were submitted to me from the Consumnes district. I examined certain samples in the court-room. I can tell whether they are well picked according to the age of the hops.

Q. Explain to the Court and the jury how age affects the question.

(Testimony of Paul E. Peterson.)

A. It affects the flavor and looks of them. You cannot tell whether they are cured properly or the quality of the hops. You can tell whether they are well picked, that is all. You can tell as to their picking by the appearance.

Q. I show you twenty samples of hops introduced in evidence, being numbered one to twenty, sent by E. Clemens Horst Company to the Pabst Brewing Company. You saw them at noon today. Look at them again if you desire to, and state to the jury whether you consider them in your opinion as choice hops? [131]

A. I consider them prime to choice.

Q. Do you regard them as choice hops of the season of 1912?

A. Yes. All hops in picking contain more or less leaves.

Q. Is it practical commercially to pick hops so that there will not be any leaves in the hops?

A. I do not think there is undue proportion of leaves in these samples. I cannot tell as to their color or flavor now because the hops are too old. I recognize my initials on the back of sample #11, as the sample I examined in October last.

Q. Were they of good flavor and good color?

Q. What did you find the character of the hops to be as being a choice hop, its flavor, quality of picking cure and so forth? [132]

A. Choice Consumnes hops. The flavor was fine. The picking was good. (The witness testified the same as to samples 17 to 18.)

(Testimony of Paul E. Peterson.)

Q. What did you find it to be?

Q. I showed you samples 25 to 38; state whether they are choice hops.

A. They are choice Consumnes hops.

Q. Do they bear an undue proportion of leaves or a fair proportion?

A. Yes, an average proportion.

Cross-examination.

(By Mr. POWERS.)

I do not pretend to be a hop expert. My knowledge of hops has been gained by raising and selling them for about 25 years, and about three years in the Consumnes district. I have never bought hops for market. My experience has been gained by growing hops and getting them ready for the market. If a hop was otherwise good and was dirty picked, it would be rejected as not a choice hop.

Q. Leaves and stems or any other deleterious matter is called dirty picking? A. Yes.

Witness is shown sample 38. State whether or not you consider that a clean pick?

A. There is a stem in there that should not be there, but that may have been an accident. I would prefer to see another sample or two.

The COURT.—Take that sample as a whole. Would you say it was clean picked or not?

A. I think it is. I have figured that all hops with as much as six or seven per cent of leaves and stems are clean picked.

Q. If it has got at least six or seven per cent leaves or stems you still consider it a choice hop?

(Testimony of Paul E. Peterson.)

A. Yes, I would consider it a good average choice hop. [133] I sold my hops that year for 22 cents. There were some hops of that character sold that year in November, but I do not remember. I am not a hop buyer, so could not tell. There may have been some sold.

By stipulation, following testimony in former trial was admitted in evidence, viz:

Testimony of F. G. Ernest Lange, for Plaintiff.

F. G. ERNEST LANGE, called for plaintiff, sworn, testified as follows:

Direct Examination.

(By Mr. DEVLIN.)

I handle the general office work and special work for Mr. Horst and have been so connected for the last ten years. I have bought and sold hops. A great many samples of hops come to our office. Thousands of samples in a year. They have to be graded, and I am handling hops all the time. Outside of that I have graded hops on the ranches. We have a large room in Mr. Horst's headquarters in San Francisco, where hops are kept. It is part of my duty to grade the hops so as to determine their quality as to being choice or otherwise. I have been thus engaged off and on during the last ten years. * * * We have a couple of ranches at Consumnes; several at Perkins; six miles from Sacramento; a ranch at Wheatland in Yuba County; a ranch in Oregon, at Independence, and a couple of ranches in British Columbia, and one in Ukiah. I

(Testimony of F. G. Ernest Lange.)

have been on nearly all the California ranches. I have graded hops from all of them down in the office. There were a certain number of bales of the Horst hops, about 497 bales, sold on prior contracts.

Q. Beginning on November 4th, 1912, until you finished selling the remainder of the bales, about 1,300 and some odd bales, were there certain expenses incurred in New York and Chicago and eastern states in selling the remainder of the 2,000 bales of what we call the Pabst hops and other hops?

A. Yes, sir. That appears on the [134] books of the company. We have not charged our own commission for selling the hops.

Q. Now, do you know if, for instance, I should deliver 2,000 bales of hops to Horst & Company to sell, such as these hops, what would be the usual and customary price per pound for selling such hops?

A. About a cent and a half a pound.

Q. And in lieu of a cent and a half a pound, you are simply giving here a proportion of the overhead charge of the New York office, for selling these 1,300 bales of hops, is that correct? A. Yes.

Q. Have you eliminated from the overhead charge the hops sold in San Francisco, the 200 bales? And the expense of the San Francisco office and all of the expenses connected with the delivery of the 497 bales?

A. Yes. I was personally familiar with the hops and samples of hops taken from the 1912 Consumnes crop. I did not see all of them, but I saw some of them. I did see the samples numbered 1 to 20

(Testimony of F. G. Ernest Lange.)

and 25 to 38 that went to the Pabst Company.

Q. In the trade what is meant by choice hop?

A. The first average of a particular section.

Q. What do you say as to those samples being choice hops or otherwise?

A. I would say they were choice Consumnes hops. I do not believe all of the samples are Consumnes hops, but the most of them are Consumnes hops, and they are all choice hops. All the hops grown on the Horst ranch were air-dried. The 3,062 bales of Consumnes hops were on hand on November, 1912; some were on the Consumnes ranch, some were in Chicago, some at New York, some were en route east and some at Milwaukee. In Milwaukee they were at Merchants [135] Storage & Transfer Company's warehouse. In New York they were at the North River warehouse and the Terminal warehouse. Generally hops of that sort were sent to the order of E. Clemens Horst Company, or notify E. Clemens Horst Company. Those in Chicago were at Sibley's warehouse.

Mr. POWERS.—When you made up the price for which certain goods sold, how did you determine what portion of the 2,000 bales should be uesd to fill that order?

A. Well, these are all the sales of Consumnes hops since November 4th, 1912, that are included in this list. They were 1,346 sold by the eastern office, and 494 bales by filling contracts already in existence. The remaining 1,062 bales were also delivered on previous sales.

(Testimony of F. G. Ernest Lange.)

Q. You cannot, then, give us from your original records where the 2,000 bales, or the 1,346 bales that were set aside,—that were sold for the Pabst Brewing Company account were stored on November 4th, 1912?

A. I do not have it here. That is in several books and it would take some time to point that out to you, but I can do so.

Mr. POWERS.—I want to check over from the entries in the books what the witness has testified to. Where is the record of the 1,000 bales?

A. In our sales-book. The insurance on 1,503 bales was the average time of 79 days; on 497 an average time of 41 days; that average time is the time between November 4th and the date of delivery. In other words, we had the 1,503 bales 79 days and the 497 bales an average of 41 days.

Q. How is the storage figured?

A. It is figured from November 4th, until the day the hops were shipped from our warehouse on the ranch. For the time they were there, we charged the storage rate of 10¢ per month, and the amount of that storage is $153.50. [136]

The witness gave counsel a copy of the list as follows:

(Testimony of F. G. Ernest Lange.)

Storage. Coast.

In Warehouse of E. Clemens Horst Co.

Lot.	Bales.	Shipped.	Months.	Storage @ 10¢ Mo. Amt. Storage.
		1912.	1912.	
523	100	Nov. 13	1	$10.00
524	100	" "	1	10.00
472)				
476)	116	" "	1	11.60
473	100	" 14	1	10.00
516	100	" "	1	10.00
519	5	" 11	1	.50
454	22	" 12	1	2.50
470	100	" 15	1	10.00
519	33	" 19	1	3.30
522	42	" "	1	4.20
517	100	" 16	1	10.00
		1913.		
525	13	May 13	7	9.10
526	18	" "	7	32.50
Var. to L. D. Jacks	65	Mar. 12	5	12.60
476	5	" 21	5	2.50
471	50	Feb. 4	3	15.00
(169)		Total Coast Storage.....		$153.50

Q. You did not have 1,500 bales on hand in California to ship to the Pabst Company on November 4th, 1912?

A. No, sir. Lot 524 were stored on our Consumnes ranch. It was stored in our warehouse on the ranch.

Q. When did the other bales of that year's crop leave the warehouse?

A. Between the time they were harvested and November 4th.

It was stipulated that the 1912 crop of Horst hops averaged 190 lbs. without tare, and that the tare was 5 lbs., making the net weight 185 lbs. per bale.

Plaintiff rests. [137]

Testimony of C. C. Sweeney, for Defendant.

C. C. SWEENEY, a witness called for defendant, sworn, testified:

Direct Examination

(By Mr. POWERS.)

I have been in the hop business for 35 years and have bought and sold hops all over the United States. Part of the time I both bought and sold hops. I am a hop merchant. I sell to brewers. I have bought from farmers in California indirectly through agents. The average broker gets half a cent a pound commission. The average profit of a dealer in November, 1912, was 4 cents a pound, including freight, that is if I bought hops in California for 19 cents, we paid 2 cents freight, and I made 1 cent profit. There was half a cent brokerage for buying. I was familiar with the market value of choice Consumnes hops in Milwaukee in November, 1912, on November 4, or thereabouts.

Q. What was the market value to the brewer?

Mr. DEVLIN.—I object to that; that is not the question; the question is the market value of the hops.

The COURT.—Yes, not to the brewer.

Mr. POWERS.—Q. What was the market value?

A. 22½ cents delivered in Milwaukee which would be equivalent to 20½ cents in Sacramento. This was in November, 1912. That market continued through November and December to my knowledge.

The COURT.—You said it was 20½ cents?

(Testimony of C. C. Sweeney.)

A. He asked me what was the market value in Milwaukee, and I said 22½ cents, and I then said that would be 20½ cents f. o. b. Sacramento, which makes it 22½ cents in Milwaukee, which continued during November and December. I base my knowledge on coast values plus freight and profit to the dealer. I know what I paid for hops here. I know what the freight was and I made the price delivered. I also know what other people were paying. I made it my business to find out what was being paid by the brewer. I am familiar with the trade journals that were quoting prices [138] at that time. I know the Chicago "Bulletin." I also know the "Western Brewer," which is a trade journal.

Cross-examination.

(By Mr. DEVLIN.)

I am in business for myself. Permanently reside in Portland, Oregon.

Q. What would be the market price in Milwaukee for hops of the character from one to eleven, the Horst hops?

A. Choice hops in Milwaukee were worth 22½ cents. Hops of this character of samples 1 to 20 were not worth as much as choice hops. They were worth three cents less.

Q. Suppose you had 2,000 bales of hops to sell, of Horst hops, in Milwaukee, which you say are not choice, what would be the market price for those 2,000 bales in November and December, 1912?

Mr. POWERS.—We object to that as immaterial, irrelevant and incompetent.

(Testimony of C. C. Sweeney.)

Mr. DEVLIN.—What hops of that grade would sell for.

The COURT.—I think that is proper cross-examination.

Mr. POWERS.—Exception.

EXCEPTION No. 11.

A. They would be worth, that quality, 19 cents. I buy hops at a price and sell them to a brewer, making a profit. The difference between the price that you pay for hops and the price that you sell is ordinarily 4 cents. If I can get 5 cents I am more than satisfied. The dealer does not pay the same price as the brewer. The price of 22½ cents was the price to the brewer. If I show the brewer some samples, and he says, what are they worth, I say 22 cents, 22½ cents; all right. He buys them. Now, if I do not own these hops at that particular time then I wire out here to a particular broker to go out, according to these particular samples and buy them. And in this particular case the particular broker had to pay 18¾ cents a pound for the hops that were sold. I was basing [139] my market value for choice Consumnes hops which were 18¾ cents a pound in Sacramento plus freight and my profit. I considered 1¢ a pound for profit to the dealer he would have to sell them for 21¢ a pound if he paid 17¢ a pound for them in Sacramento. That 4¢ includes freight. I sold some Yakima hops to Pabst. Yakima is in Eastern Washington. I got 22½ cents for them. I did not sell them any Consumnes hops

(Testimony of C. C. Sweeney.)

that year. I did sell Consumnes hops in St. Louis and Chicago in November, 1912.

Q. Have you got any books to show it?

A. It is on my books; it is a sale that I made.

Q. Where are your books?

A. In Portland.

Q. When were you requested to be a witness here?

A. Originally?

Q. No, this time.

A. About June 1st, on a Saturday.

Q. Where at, San Diego? A. Yes.

Q. You have been consulting with the attorneys since you have been here? A. Yes.

Q. Weren't you requested to bring your books to verify your sales? Didn't they ask you to bring your books, so that if I wanted to ask you about them you could verify them? A. No.

Q. They did not ask you about them?

A. No; they did not ask me to bring any books; they asked me to get some memoranda, and I put the memoranda down in my little books.

Q. They did not ask you to bring your books with you? A. No.

Q. You knew you were going to testify as to the price, didn't you? A. Yes.

Q. You did not bring your books and were not requested to bring your books? A. No.

Q. Will you state what Consumes hops you sold in November—after November 4th, 1912; did you sell any?

A. Yes. I sold them in St. Louis.

(Testimony of C. C. Sweeney.)

Q. How many have you sold in St. Louis?

A. A couple of hundred [140] bales.

Q. What do you mean? Was that 200 or 500?

A. 200.

Q. How do you know that?

A. I can tell by my memorandum.

Q. Where did you get the memorandum from?

A. From our report from Oregon last year, when we were here before.

Q. You got it then? A. Yes.

Q. Where is the original book you took it from?

A. I did not take it from it; I simply wired what sales did I make on such and such a date and they wired me.

Q. Who wired you? A. My partner.

Q. Your partner in Oregon? A. Yes.

Q. That is all you know about it?

A. I remember the fact that I sold the hops myself. I also sold 100 bales to Otto Steipel after November 4, 1912, and I paid 18½ to 18¾ cents a pound f. o. b. Sacramento for those hops. They were bought on the samples and the samples were Consumnes. I meet other men around in the trade and we discuss matters amongst ourselves. I did not know of the sale in November, 1912, by the Horst Company to the Steil Brewing Company of 50 bales at 14½¢ at Milwaukee, nor of the sale in that month to the Springfield Brewing Company of 98 bales at 14¢, nor of their sale of 100 bales of Consumnes hops to the Narragansett Brewery at 16¢, nor of a sale on

(Testimony of C. C. Sweeney.)

November 14th to the G. F. Rotheter Brewing Company of 25 bales of hops at 16¢.

Q. The only knowledge you have of Consumnes hops are the two sales you made?

A. I beg your pardon. I meet other men around in the trade, and we discuss matters among ourselves. Now as far as the sales of Horst you are quoting to me are concerned, I know nothing of them personally.

Q. What effect in your judgment would it have to place 2,000 bales of hops upon the Milwaukee market in November, 1912? [141]

Mr. POWERS.—We object to that, as we do not think in our opinion the market value is to be determined by any such condition.

The COURT.—Market value is always determined by the supply and demand. The objection will be overruled.

Mr. POWERS.—Exception.

EXCEPTION No. 12.

A. I did sell myself 2,000 bales during the month—

The COURT.—Won't you answer that question? It is not a question of what you did. It is a question of your judgment as a man having knowledge of market conditions as to what the effect would be of placing on that market 2,000 bales?

A. The 2,000 bales would have been readily absorbed by the market.

The COURT.—Q. You said that the Consumnes hops that you bought were to supply orders that you

(Testimony of C. C. Sweeney.)

already had. That is what he is talking about.

A. I bought 700 or 800 bales of Consumnes right here. [142]

Mr. DEVLIN.—From whom?

A. From Spicer; I bought these four samples that are there, Grimshaw's, Jack Lannaghan's and Kennedys and these hops right there, referring to samples 21 to 24. The crop in 1911, in October, of Consumnes, was worth along about 40¢ and the price came down—the price of the 1911 crop kept coming down and down and down. Now then, the 1912 crop came in, which was harvested in August and opened up at a certain price, but the price of the 1911 crop during the months of October, November and December was one thing, and the price of the 1912 crop, harvested in August and September, 1912, was another proposition. Contracts for the 1912 crop opened up along at 25 or 26¢, along there, but that was in February and March of 1912 before the crop was ever harvested; then she began to ease off and the market came down to along I would say 20 cents, 19 cents; it fluctuated a little in there. That was about the condition of the market that year.

Q. When did the 1912 crop begin to go down in price, what month of 1912?

A. In Oregon they had a poor crop as regards quality in 1912—the 1912 crop of Consumnes hops commenced to go down after January, February and March of 1912, before it was harvested.

Q. Before it was harvested? A. Yes.

Q. Did it keep going down?

(Testimony of C. C. Sweeney.)

A. Not particularly; there were features that entered into it, because Consumnes were good and other crops were poor—the Consumnes crops held up pretty well in price.

Q. The only way of disposing, as I understand you, of any hops at all is by personal solicitation?

A. Not necessarily; they sell hops by mail and by wire.

Q. By mail and by wire? A. Yes.

Q. There is no auction for the sale of hops—they are not sold at auction? A. No.

Q. They are sold by personal dealings between the people or by mail or by wire?

A. By wire, mail or personal visits. [143]

Q. What time is the busy season in the year for selling that class of hops?

A. September, October, November and December.

Q. What are the busiest months of those?

A. Say October and November.

Q. Do you know of any hops being sold in Oregon in November and December at 12 cents and 12½ cents? [144]

Mr. POWERS.—We object to it unless you confine it to choice Cosumnes hops.

Mr. DEVLIN.—I am trying to find out what he knows about it.

A. Oregon hops?

Q. Yes. A. No—not choice hops. [145]

"Q. Now, Mr. Sweeney, you have been helping the defense prepare this case, haven't you?

A. I have given him all the assistance I knew of,

(Testimony of C. C. Sweeney.)

and in every manner, shape and form that I could.

Q. You began to help Mr. Pabst before the lawsuit was begun, didn't you?

A. I didn't know a thing about the lawsuit before it was started, and they were coming out here.

Q. When did you first begin to assist the defendant in this case?

A. I arrived in Milwaukee one morning about 9 o'clock and I wanted to sell Mr. Pabst some hops, and he said, "Hello, Sweeney, I wired you," and I thought he was going to give me an order, and I said, "What can I do for you?" he said, "Help me out on a lawsuit," and I said, "When does it come off?" and he says, "It is off"; then he told me they were starting west, and I never knew anything about the particulars until I got on the train and came back to this city here from Milwaukee. The only papers I read were on the train coming out here.

Q. How did you tell him you could help him?

A. I am the man that gave him the four samples of hops. I came in there and he said, "Have you got any samples except these?" and I said, "I have not any with me," and he said, "Would you send me some?" and I said, "Sure," and I took four samples out of the original sales that came from the coast of those various hops that I sold him, and I gave them to Pabst. That is my connection with this case.

Q. During the same conversation he told you he had trouble with Horst?

A. He did not tell me; I didn't know he had bought any hops from Mr. Horst. If I had known that I

(Testimony of C. C. Sweeney.)

might have kept away from him.

Q. And you came out to the coast?

A. At his request when [146] the case was coming on, and came to Sacramento.

Q. How did you know what he wanted you to do?

A. He knew I was a hop man, and he knew what he wanted me for.

Q. He told you what he wanted you to do?

A. Yes.

Q. You jumped on the train and came right out?

A. Yes.

Q. Left your business? A. Yes.

Q. What did you do that for?

A. I went there to sell hops.

Q. I say why did you leave your business and come to California when you did not have to go—what was the reason that actuated you in doing it?

A. I did not have to do so.

Q. I say what induced you to come from Milwaukee to California at Mr. Pabst's suggestion?

A. At the suggestion that I help him.

Q. For the purpose of obliging Pabst?

A. Yes.

Q. For the purpose of getting trade?

A. I have traded with him a long time.

Q. What was the reason that induced you to leave East and come out here to California to work on this case?

A. Because I had four samples in there that I had bought here, and they were the samples which he figured were in contention.

(Testimony of C. C. Sweeney.)

Q. Is that the only reason?

A. That is the only reason I know of, to come here and help him out; I would help out a friend anywhere.

Q. You would travel that many miles to help out a friend anywhere?

A. I am discommoding myself now to come here and help him out.

Q. You have been in consultation with Mr. Zaumeyer? A. Yes.

Q. When did you last see Mr. Pabst?

A. I have not seen him since last year—December, I guess.

Q. Did you sell him any hops last year?

A. Yes, I got a contract with him.

Q. You have seen the attorneys, Mr. Geary and Mr. Powers? A. Yes. [146½]

Q. And talked to Mr. Schultz another witness here? A. Yes.

Q. What else have you done toward working up the case?

A. Nothing more—in what way do you mean?

Q. You have been assisting them with advice, giving them pointers, explaining things to them?

A. I have assisted them on various little trifling matters—I have helped them out on rather technical points, such as you would with a man who was not thoroughly familiar with the business.

Q. You gave certain samples to Mr. Pabst on what you call choice Cosumnes hops, didn't you?

A. Yes, I did.

(Testimony of C. C. Sweeney.)

Q. Were they choice Cosumnes hops, Mr. Sweeney?

A. No, they were prime.

Q. Why did you want to fool Mr. Pabst though?

A. The Judge asked that question before; He asked me—

The COURT.—Don't go back to what was asked before.

Mr. DEVLIN.—Q. I would like to know why you wanted to fool Mr. Pabst by selling him choice Cosumnes hops when they were not choice Cosumnes hops?

A. I was not selling them to him. He asked me for four samples.

Q. Mr. Pabst asked you to give him four samples of choice Cosumnes hops, didn't he? A. Yes.

Q. And you gave Mr. Pabst four samples of what you represented to him were choice Cosumnes hops, didn't you? A. Yes.

Q. That representation was not true, was it?

A. No, it was not true; they were primes.

Q. And Pabst believed you, didn't he? A. Yes.

Q. You received him, didn't you?

A. Not necessarily.

Q. Why not?

A. If he had bought hops from me—there was no transaction there whatever.

Q. I do not get your explanation yet. You admit that what you said to Mr. Pabst was not true. Can you give any explanation of why you told that untruth to Mr. Pabst? [147]

A. Suppose I am going down to do some business

(Testimony of C. C. Sweeney.)

and a fellow has always got to have a little leeway to take care of himself, because even if I told him it was choice, he would question it; if we got down to a show down, he would say it is so and so, no matter what I told him; it is a question of how much I would sell them to him for, and I have got to protect myself, and have a little leeway.

I could not misrepresent it when I sent it to him to look at because he passes his judgment on it.

Q. Mr. Sweeney, a choice hop, of a particular year's growth isn't necessarily a choice hop when another year's crops comes is it? A. Oh, no.

Q. Then in representing to him that you were furnishing him samples of choice hops of 1912 crop you were representing something to him that he could not know was not true? Isn't that true?

A. He would pass his judgment on it.

Q. I am not asking you about that. I am talking to you about what you said to him.

A. I told him they were choice.

Q. You told him they were choice? A. Yes.

Mr. DEVLIN.—Q. How do you get your expenses for your time and gravel in this case?

A. Pabst will pay my expenses.

Q. Has he paid them yet for the last trial?

A. For the one we were here before?

Q. Yes. A. Yes.

Q. And for your time? A. No, no.

Q. You gave your time for nothing?

A. Sure." [148]

(Testimony of C. C. Sweeney.)

Redirect Examination.

The four cents was the difference in the price from the dealer to the brewer included 2 cents freight. The relative price of Yakimas and Consumnes was the same. The market value of Consumnes hops in March, 1912, in Sacramento was about 25 cents. In August, September and October, 1912, about 19 or 20 cents. The market price in Sacramento for choice Consumnes hops of the crop of 1912 in November was 18¾ cents and was the same in December.

Mr. POWERS.—In our stipulation there should be included the testimony with reference to the ripeness of hops.

Mr. DEVLIN.—Whose testimony is it?

Mr. POWERS.—Mr. Horst's, as to the ripeness and time of picking.

Mr. DEVLIN.—Anything Mr. Horst testified in the former case I will concede may go in.

Mr. POWERS.—As to ripeness and time of picking hops we have stipulated that it shall go in.

Testimony of P. C. Drescher, for Defendant.

The following testimony given at the former trial was read in evidence, viz., the testimony of P. C. DRESCHER, called as a witness on behalf of defendant, sworn and testified as follows:

Direct Examination.

(By Mr. POWERS.)

I am familiar with drying of hops, but I have never actually done the drying. With reference to the price of choice Consumnes hops during the month of

(Testimony of P. C. Drescher.)

November, 1912, the market price obtaining at that time was 17½¢. That was the price from the dealer to the dealer. I could not answer as to the price of the dealer to the farmer. [149] Ordinarily the price to brewers is somewhat higher. The market value of air-dried Consumnes hops during the month of November, 1912, was 17½¢. The market value of choice air-dried Consumnes hops during the season from November, 1912, to March, 1913, was between 17½¢ and 19¢. [150]

Witness then examined samples 1 to 20, and referred to them as follows:

Sample 18 not clean picked. Sample 17 not a choice hop. Sample 16, in my judgment, was not a choice hop, not cleanly picked. Sample 14 was not a choice hop. Sample does not give any indication of having been separated before. Sample 13 I do not consider a choice hop on account of its checkered color, and not being cleanly picked. Sample 11 was not cleanly picked. In some cases the age will give you a good idea as to clean picking. It was evident from the age of that sample that it was not cleanly picked. Sample 12 was not cleanly picked.

Witness testified that samples 15, 9, 10, 1, 19, 5, 20, 8, 4, 7, 3, 6 and 2 were not cleanly picked. Sample 26 dirty picked. Sample 28 dirty picked. Sample 27 not cleanly picked. Sample 30 is not choice air-dried Consumnes hop, is not cleanly picked. Sample 35 is badly picked. Sample 25 is not cleanly picked. Sample 38 is not cleanly picked, contains stems which are extraneous and which should not be in a choice

(Testimony of P. C. Drescher.)

hop. Those stems lower the grade of a hop very much. Sample 33 is not cleanly picked. Sample 32 is not cleanly picked. Sample 34 is not cleanly picked.

Mr. POWERS.—I show you sample 36 and ask you to examine it and say whether or not it is a complete sample.

A. This sample I am unable to tell anything about because it is very small and not sufficient to give any idea of the age of it. I would not be able to give you an opinion on that sample, because there is not sufficient of the sample to enable me to do so. Sample 37 is not choice hops, owing to the leaves and not being cleanly picked. Sample 29 is not choice air-dried, not being cleanly picked.

Q. I show you sample 22 and ask you to examine it and say (85) whether or not in your opinion it is choice hops.

A. This sample is also too loose and broken to give a good opinion [151] of judging. The general appearance of this sample is better, but it is not as cleanly picked as it should be. With reference to sample 23, I would not consider it choice, although it is better than any of the other samples. With reference to sample 23. I do not consider sample 24 as choice to sample 23. I do not consider sample 25 equal to sample 23. I do not consider sample 24 a choice hop, but it is better than sample 24. Sample 21 I do not regard as a choice hop. It is better than sample 25.

(Testimony of P. C. Drescher.)

Cross-examination.

(By Mr. DEVLIN.)

There is no such thing as a perfectly clean picked hop, without a single leaf in it. They all contain more or less leaves. In every sample I would expect to find more or less leaves. The amount of leaves that are allowed for a hop to be choice is required by experience in handing hops and determining their quality. There is no absolute standard. The quality is determined arbitrarily by what the eyes show. There is no percentage. Hops are never picked free from leaves commercially. If they were picked absolutely clean it would add considerably to the expense. The leaves are all the green color. The color is changed in drying. The leaves will to some extent disappear. They will not be so visible. I have bought and sold Consumnes hops. I do not know that there is any difference between air-dried and kiln-dried hops. All hops are dried by hot air. I made no distinction between air-dried and kiln-dried hops in answering Mr. Powers' questions. I have seen different appliances for drying hops. Practically all the machines I have seen were kiln driers. I have seen a machine different from the ordinary kiln on the Horst place at Wheatland. I do not know whether all the hops in the Consumnes district were dried in one way or not. I make no distinction between air-dried and kiln-dried hops. * * * I am the agent here of the Pabst Company in handling of its beer.

Testimony of C. C. Sweeney, for Defendant (Recalled).

C. C. SWEENEY, recalled by defendant, testified as follows:

Direct Examination.

(By Mr. POWERS.) [152]

With reference to samples 1 to 20 I would state their character and grade runs from medium to prime. The highest grade of those is below choice. A choice hop is one that is ripe, uniform in color, fully matured, cleanly picked, free from damage by mould and insects, good flavor, properly cured and baled. These hops do not come up to that standard in any particular. They are not bright nor uniform in color. They are not cleanly picked. They are dirty picked. They are not fully matured. That is the hop had not reached the stage of ripeness when it contains the full amount of lupulin. A hop that is picked early does not contain the full amount of lupulin. Referring to sample 13, the color is mottled and is not uniform. There are green berries, brown berries and yellow berries.

Q. What should the color be in a choice hop?

A. The color in a choice hop should be uniform, whether green or yellow, it is immaterial. This sample is not a well picked hop; it is a dirty picked hop. I would grade it as a medium sample. With reference to the other samples on the table. They are a little bit better grade. But none of the better grades run as high as choice. I first saw samples 21 to 24 when I received them from Wolf, Netter &

(Testimony of Otto E. Schultz.)

early. I examined sample #36 and found it rather small, too small to base a judgment upon. Samples 25 to 28, with the exception of 36, were of the character of medium to prime. They are practically the same character of hop as 1 to 20. A few samples of 25 to 38 would class as prime. I also examined samples 21 to 24, and found them very uniform in color, full in berry, and well filled with lupulin. They were prime to choice. They were [155] not choice, for the reason of the uncleanliness in picking, But for the picking they would class as choice. They were practically the same character of hop as 1 to 20. Samples 21 to 24 were hops of a better quality than 25 to 38. Samples 25 to 38 would not be accepted in the trade as hops equal to 21 to 24.

Cross-examination.

(By Mr. DEVLIN.)

I have not been directly engaged in the hop business for the last ten or twelve years. Our concern used four or five hundred bales of hops. I have nothing to do with the buying of hops. I am a maltman. Mr. Gottfried buys the hops for the brewery, but I am in daily contact with the hop business. I do not buy hops for the breweries or anybody else. I know the various sections in California, but I have never been in California before. I could not distinguish the different hops in California, but you show me the samples, and I can tell you the quality of the hops. A choice hop is a choice hop no matter where it is raised in any part of the world. A choice Consumnes hop is as good as a choice New York hop, but it does

(Testimony of Otto E. Schultz.)

not sell in the market for as much as a choice Bohemia hop. For the last five years the New York hop, grade for grade, bring about twice as much as the California hop. I have seen choice California hops in the various brewery offices. Some choice Sacramento County hops. A very small proportion of California hops are choice. A choice hop has not got to be a perfect hop. The Faazer hop in Bohemia is the nearest thing to a perfect hop. The reason that hops are not perfect is because they have more or less leaves bound with them, or they may be immaturely picked. Choice hop is a fixed term. * * *

I would not expect to find 2,000 bales all uniform in color. They might vary in color and still be choice. They might have more or less leaves in them and still be choice, but there is no [156] percentage that would determine it, except by inspection. New York hops are less cleanly picked than California hops on the average, but they sell at a higher price. Sometimes I can tell the difference between a California hop and an Oregon hop, but not always. The same thing applies to hops raised on the Pacific Coast and in the east. I do not think I could tell the difference between Consumnes hops and American River hops. If you forward me Russian River hops and they were like samples of the Consumnes hops, I could not tell them apart. I do not think I could tell an Oregon hop, but I could tell a Bohemian hop. * * *

I saw some choice California hops in the growth of 1912 in the Pabst Brewing Company's offices, or hop-house. I do not know where they came from.

Testimony of Milton L. Wasserman, for Defendant.

MILTON L. WASSERMAN, called for defendant and sworn, testified as follows:

Direct Examination.

(By Mr. POWERS.)

I am in the general hop business. Have been for 25 years buying and selling hops. Consider myself a hop expert. Make my living in that way and am familiar with the usages of the trade. We handle on an average of fourteen or fifteen thousand bales annually, buying and selling to the brewer through our eastern connections. We have been familiar with the prices obtained for the last ten years in the hop-trade. We have seen samples of the Horst air-dried hops. With reference to choice Consumnes hops of that character and choice Consumnes hops of the kiln-dried character, the physical character is the same and the same figures would be obtained for them commercially. The price of Consumnes hops, if choice, whether kiln-dried or air-dried, would be the same. I have examined samples 1 to 20 on this table and lotting the whole bunch together I would call them a good brewing hop. They would range between medium and prime. That is, averaging them all together. [157] There are some better than others. I would grade the poorest of the lot, medium. I would grade the rest good brewing hop, about prime.

Q. Why are they not choice?

A. The color is lacking. They are not uniform in

(Testimony of Milton L. Wasserman.)

color. The picking is the main contention on account of their quality not being choice. There are some leaves and stems. It is not good and it is not very bad. It is not a clean picked hop. I examined samples 25 to 38 on this table. I found them immature and some [158] of them were dirty pick. I would grade them about medium to good brew. These samples are not quite as good on the whole as samples 1 to 20. The reason samples 25 to 38 are not choice is that they are lacking in color and picking principally. The samples are rather small to go into much detail on them, but looking at those samples now, being aged, we cannot judge much about the aroma of them, but from the appearance of the samples, the main contention is their picking and color. I have also examined four samples 21 to 24. They are better than 1 to 20 or 25 to 38. I would grade them as prime. The color is not quite up to choice. If I could judge of the flavor of them, if they were too fresh samples, I might be able to stretch a point, but looking at the samples now, or the appearance of the samples, now, I would simply grade them as prime hops. The pick of them is very good. It is better than 25 to 38. I would consider them clean picked hops. If told that they had been in cold storage from November, 1912, with the exception of being taken out once or twice for investigation and then opened again in April, 1914, about three weeks ago, brought out from the east, left around the courtroom, we could not judge of uniformity of color so well, no matter if they have been kept in cold storage,

(Testimony of Milton L. Wasserman.)

when they are taken out of cold storage there is some slight difference. You can judge the color there but not as good as if they were fresh hops. So far as uniformity of color you could judge that. You could not judge the flavor at all. I bought some. This would be the price to the grower. When that hop was sold to a brewer we would have to include the operating expense here, which is figured at about half a cent, and the freight 1¾ cents and the salesman's commission, say from four to six months' time, to the brewer and interest on their money. [159] They generally figure it that way. They always figure about three cents a pound expenses and operating between the growers' price and the selling price. Dealers will pay the same price for Consumnes hops as for Russian river, if they are choice. There is a standard brokerage between dealers and the market which is ½¢ a pound, and the 3 cents is the expense without profit. We add a profit to that which would be 1½¢. Sometimes where a competitor steps in we have to sell at cost in order to hold our trade, but 1½¢ is the average profit. [160]

Cross-examination.

(By Mr. DEVLIN.)

I worked for Mr. Uhlman, who is engaged in buying and selling hops. I reside in Santa Rosa. I believe my firm is a competitor of Mr. Horst and has been for several years. * * * Concerning picking there is no standard to judge picking by, as to how many hops there should be in a bale, except by inspecting the hops. If you find stems or leaves in

(Testimony of Milton L. Wasserman.)

opening up a sample, or inspecting a sample, then you know the hops are not cleanly picked. Commercially, there are very few. Hops cannot be picked absolutely clean. The process of drying them in the kiln decreases them in stems and leaves when they are in the bale. It evaporates some of the leaves and shrinkens the stems. * * * New York hops are not as clean picked as California hops. Still, New York hops sell for better prices than California hops. I did not buy or sell any air-dried Consumnes hops in the year 1912. * * * From a buyer's standpoint, there were no choice hops in the Consumnes section.

By stipulation the following testimony at the former trial was admitted in evidence, viz.:

Testimony of John Mahon, for Defendant.

JOHN MAHON, called for defendant, sworn, testified as follows:

Direct Examination.

(By Mr. POWERS.)

I am a hop-grower and reside at Elk Grove in the Consumnes District. I have examined sample 29, upon which my initials appear. That recalls to my mind that I saw it the latter part of 1912, or the fore part of 1913. It was shown to me by Mr. Conrad and I do not remember the other gentleman's name. I examined it at that time to see whether or not it was choice. They told me the purpose of the examination at that time was that they wanted to work up a trade for Consumnes hops with the brewers. [161]

(Testimony of John Mahon.)

Cross-examination.

(By Mr. DEVLIN.)

I examined several samples. I signed a statement. The signature on the statement shown me is mine. It reads as follows:

"I, John Mahon, doing business at Consumnes, hop-grower by occupation, do state:

1. I have had experience as hop-grower with hops, for the past thirty-five (35) years at Consumnes, and that I am competent to judge the quality of Consumnes River hops.

2. That I have personal knowledge of the *personal* crop of hops grown along the Consumnes River in the year 1912.

3. That I have to-day examined sealed hop samples submitted to me by R. J. Nichols and marked X5, 6, 7, 8, 9, 10, 12, 14, 15, 17, 19, 21, 22, 23; 25; 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, and identified by my initials signed by me thereon, and

4. I say that each and all of said samples is in quality equal to or better than choice Consumnes hops of the crop of 1912.

Dated Elk Grove, Nov. 19th, 1912.

JOHN MAHON."

Q. Are those statements correct?

A. No, sir. I signed it because they said they would erase the word "choice," and under those conditions I signed it. I did not consider them choice. I signed it because I supposed the word "choice" had been erased. They said they wanted me to sign the statement to work up a trade with the brewers for

(Testimony of John Mahon.)

Consumnes River hops. I did not consider the hops choice. I notice that the words "better than" are stricken out in front of the word "choice" before I signed it with the understanding that the word "choice" was to be erased. I did not consider the hops choice according to my opinion. I thought average was the word they used, if I remember right. I do not remember the name of the other man with Mr. Conrad. I had some choice hops in 1912 according to my judgment. [162] All my hops were taken as choice. I could not say about the other hops grown there, because I did not see them. I think my hops were as good as the neighbors. I think Mr. Chalmers' hops were as good as mine, and I think Mr. Hoover's were as good as mine. That was all the hops I saw grown in the Consumnes River except those samples. By a choice hop I mean a hop that is well matured, well cured, good strength, color and so on. They have got to be reasonably well picked. We try to get them as clean as possible. I put all my hops in together in the season 1912. I did not take out a certain percentage as clean hops. I sold my hops to Nebius & Drescher.

Redirect Examination.

(By Mr. POWERS.)

If they had not told me that they were going to scratch out the word "choice," I would not have signed the statement. At the time I looked at several samples. I do not think any of the samples shown me were choice. Some were cleaner than others, [163] some were discolored and some were dirtier than others.

Testimony of Otto J. Koch, for Defendant.

OTTO J. KOCH, called by defendant, sworn, testified as follows:

Direct Examination.

(By Mr. POWERS.)

I am a hop-grower and buyer and have been in the business of growing hops since 1903, and in buying and selling hops since 1907. I make my living by selling hops and consider myself a hop expert. I deal in seven or eight thousand bales of hops a year. I have examined the hops here, 1 to 20, and consider them medium to prime. They are not cleanly picked or even in color. The worst samples are medium and the best samples are prime. I have also examined samples 25 to 38. They grade medium to prime. I have examined the four samples, 21 to 24. I consider them prime. Samples 25 to 38 do not compare in quality with 21 to 24. They are not so good.

Cross-examination.

(By Mr. DEVLIN.)

I have handled hops for Nebius & Drescher for the last couple of years. I have never worked for them. I sell for Mr. Drescher. I sold for him in the year 1912, a portion of the year. I shipped some hops for him this year.

By stipulation the following testimony at former trial was admitted in evidence, viz.:

Testimony of C. S. Chalmers, for Defendant.

C. S. CHALMERS, called for defendant, sworn, testified as follows:

Direct Examination.

(By Mr. POWERS.)

I have been in the hop business in the Consumnes district for a little over thirty years. I know the Horst place. I visited the Horst ranch during the picking season of the year 1912 with Mr. Traganza, along about the last of August or the first part of September.

Q. What did you observe about the picking machine? Just explain what you saw.

A. Do you mean for me to tell you just what I saw?

Q. Yes.

A. Well, I will tell you. They were running them from the kiln over to the cooler before they were labeled.

Q. That was all going on simultaneously?

Q. What operations were going on at the hop-house at the Horst ranch, while you were there?

A. They were picking, drying and baling to. [164]

Q. Explain to the jury what the processes were on the ground, from the green hops to the picker, and so forth.

A. There is no man under the sun who could swear that they were the same hop, only the man that shipped the hops.

Mr. POWERS.—Q. These were hops on the Con-

(Testimony of C. S. Chalmers.)

sumnes ranch of Mr. Horst?

The COURT.—State what you saw at Mr. Horst's ranch while they were baling Consumnes hops.

A. That is picking and all. I went up there just to see the picking-machine. It was my first experience with a picking-machine. I have picked by hand all my life.

The COURT.—Leave out all of that. Tell us what you saw.

A. I went there to see the picking-machine run and it was running. The man who had charge of the picking-machine was at the picking end of it, and I asked him if I could look through it, and he said "I will show you." We went to the back end and where the elevator was taking the leaves into the kiln. They had canvas along there to keep the leaves from going out. The stems and leaves were going into this elevator, and I said to the man, "Don't you pick out none of the leaves?"

Mr. POWERS.—Q. What did you do about an examination of the kiln?

A. I went up to the kiln, and the hops were powdered up in the kiln where they were drying. They went into the cooler-room and there was a man there baling them. They were going into a bale, then they were putting them out on the plains in the boiling hot sun with no cover over them whatever.

Q. What was the condition of the hops in the Consumnes district with reference to ripeness on or about Angust 12th, 1912?

A. They were green, too green to pick. They

(Testimony of C. S. Chalmers.)

ripened from about the 20th to the 25th of August. There were no hops ready to pick before that. I examined certain samples of hops that were shown to me by Mr. Conrad from Mr. Horst's ranch, in the latter part of [165] the year 1912. There was another man with him. I have forgotten the other man's name. I put my initials on the back of the cardboard, on some of them. I am familiar with the process of curing and handling hops and the character of hops. The character of the samples of hops that were shown to me by Mr. Conrad were not first-class hops because they had a lot of leaves in them and a lot of stems in them. This man came down there and showed me some samples and said we were not getting what we ought to get for our choice Consumnes hops. They said "we have some samples here for you to look at, that we are going to get a better price for. We have a man in the east who is looking out for them, and we are going to get a better price for Consumnes." They wanted me to look at them. I looked at them and told them that I would sign the statement, but not as choice hops. They were green samples. The samples they showed me were green. They had leaves in them and stems.

Cross-examination.

(By Mr. DEVLIN.)

I sell my hops to anybody that comes along. I have a contract with Mr. Drescher. I have been selling hops to him for twenty or twenty-five years. I have at times received advances from him. There ain't a hop man but what does. I have a few of my

(Testimony of C. S. Chalmers.)

hops contracted for in advance with Mr. Drescher. The paper shows my signature (referring to statement presented by Mr. Devlin).

Mr. DEVLIN.—I introduce this paper in evidence as a part of my cross-examination. It reads as follows:

"I, C. S. Chalmers, doing business at Consumne, hop-grower by occupation, do state:

1. I have had experience as hop-grower with hops for the past thirty (30) years at Consumne, and that I am competent to judge the quality of Consumnes River hops. [166]

2. That I have personal knowledge of the personal crop of hops grown along the Consumnes River in the year 1912.

3. That I have to-day examined sealed hop samples submitted to me by R. J. Nichols and marked X5, 6, 7, 8, 9, 10, 12, 14, 15, 17, 18, 21, 22, 23, 25; 28; 29; 30, 31, 33, 34, 35, 36, 37, 38, and identified by my initials signed by me thereon, and

4. I say that each and all of said samples is in quality equal to or better than choice Consumnes hops of the crop of 1912.

Dated at Consumne, Nov. 19, 1912.

C. S. CHALMERS."

I never read it through. I never knew there was anything wrong one way or the other with the paper when I signed it.

Q. When you signed that, did you tell the truth?

A. As I stated before, when I signed it I said that the samples were not choice hops. I never put that

(Testimony of C. S. Chalmers.)

in the paper. I *say was* out in the field working when the gentlemen drove up to the hop-house. I do not live down at the hop-house. I live about 2 miles away. When those men came here, I was working hard. I did not pay much attention to them. If I had had time I would have read the paper over to see what it was. As I said before I was doing it just to help them out. They said they were going to get a better price for Consumnes River hops and I signed that, but not as choice hops. I would not have signed anything in the world like that if I had stopped to read the paper over. I was hard at work in the field. I am nearly fifty years old. I know one of these gentlemen here, Mr. Conrad. I know I signed some papers. There were no choice samples that I saw. They were all about the same. Some of them were a little cleaner and some were brighter in color but none of them were choice.

Testimony of Edward Traganza, for Defendant.

EDWARD TRAGANZA, called for defendant, sworn, testified as follows: [167]

Direct Examination.

(By Mr. POWERS.)

I am a farmer by occupation. I know Mr. Chalmers who has just left the witness-stand. In the latter part of August, I went to the hop-*w*ards of Mr. Horst with Mr. Chalmers. We saw the hop-dryer in operation. We stayed there probably two hours or something like that.

Testimony of C. S. Chalmers, for Defendant (Recalled).

C. S. CHALMERS, recalled by defendant.

Direct Examination.

I do not know the name of the man who was in charge of plaintiff's ranch, known as the Murphy ranch, with whom I had conversation. [167½] He was in charge of the picking-machine. All I know about the man is that he told me he was in charge. There must have been fifty men working there, and the particular person we had the conversation with was in charge of the picking-machine. I asked for Mr. Conrad and he said he was on another ranch and that he had charge of the picking-machine at the time. He also said he would show me around. We walked along looking at the machine and to where the hops were going out of the elevator into the kiln.

Q. Will you state Mr. Chalmers, what conversation you had with this party, that you met there apparently in charge of the hop-picking plant at that time; was there any other person on the premises at that time exercising any authority in the picking-house that you saw? A. I never seen any.

Q. State what conversation occurred.

A. I will just tell you what I seen, and that is all I know. I went through the picking-machine where they were picking; I went along to where the picking-machine was and I asked him why they were letting the leaves and stems go in there, and he said, we have

(Testimony of C. S. Chalmers.)

got a cheap contract and we have orders to let everything go in.

Q. What was the condition that you observed concerning the leaves and stems going in, that lead up to this conversation?

A. Well, the thing that throws the hops out was not working at all. It was standing still, and that is how we came to talk about it. Then we went along to the elevator that takes the hops up into the kiln.

The COURT.—The leaves and stems were ground up and sent to the kiln?

A. The picking-machine strips them right off, and the leaves and [168] stems were going up into the kiln. You could not see any hops. There were no leaves or stems being thrown out by the machine at all, that I saw. What we call the drum was standing still. It was not running. The vines are pulled right through lengthwise and no leaves and stems are stripped off the best they can. What did not pull off they had a man outside picking them off, and they left the rest on, and a little stems, leaves and so forth went in with the hops. The biggest stems were not sent up with the hops. They did not grind the vines up. The man said that they had orders to let everything go up in the kiln. That they had a cheap contract and the blower was stopped. I could not tell you who the man was I talked to. I had never seen him before nor since. I could not say whether he was any of the gentlemen here in the courtroom. I will not say it was not. I was there two hours or two hours and a half. I went around from one building

(Testimony of C. S. Chalmers.)

to another looking at the hops. That was the first time I had ever seen a picking-machine. I had seen a lot of hop buildings before. I wanted to see how the hops were cured and the way the picking-machine worked. I had never been on the ranch before. Mr. Traganza asked me to take a ride over and see the picking-machine. [169]

By stipulation, following testimony in former trial was admitted in evidence, viz.:

Testimony of T. A. Farrell, for Defendant (Recalled).

T. A. FARRELL, recalled by defendant.

I have examined the entries in the sales-book of the plaintiff on file here, and have checked up the sales of Consumnes hops for the year 1912, and added up the number of bales that are shown in this book as having been sold on dates prior to November 4th, 1912. They amount to 2,764 bales.

Deposition of Gustav Pabst, for Defendant.

The deposition of GUSTAV PABST, for defendant, was then read.

Witness sworn.

Direct Examination.

(By Mr. SPOONER.)

I am, and have been since 1904, president of the Pabst Brewing Company, and familiar with the complaint and answer in the case, in every important detail. Mr. Zaumeyer and myself conducted the negotiations involving the 2,000 bales of choice hops

(Deposition of Gustav Pabst.)

referred to in this action. Mr. Zaumeyer is a grain and hop buyer for my concern, and, as such, passed upon the acceptability of hops which were offered for purchase. I remember in a general sort of a way the receipt of the night letter dated San Francisco, August 21, 1911, from E. Clemens Horst Company, and also the telegram to E. Clemens Horst Company dated August 25th, 1911, and night letter dated August 25th, 1911, addressed to Pabst Brewing Company, and a day letter addressed to plaintiff August 26th, 1911. I am familiar with the letter of August 24th, from E. Clemens Horst Company to Pabst Brewing Company, and recall the receipt of this letter. It refers to 500 bales of the 1911 crop at 40¢. That transaction was consummated by the delivery of said five hundred bales and the use thereof by the Pabst Brewing Company. The shipment of the 1911 crop was between August and December, 1911. I remember the telegram from plaintiff dated August 29, 1911, and also one from defendant dated August 28, 1911. Also night letter dated August 27th from plaintiff, and telegram dated August 28th, from Pabst Brewing Company. Also letter dated September [170] 4th, 1911, from plaintiff to defendant. I remember its receipt. The letter reads as follows:

In reply refer to H–39811. Sept. 4th, 1911.

Pabst Brewing Co.,

Milwaukee, Wis.

Gentlemen:—

Enclosed herewith we hand you contracts in tripli-

cate for the two lots of 1,000 bales Choice Pacific Coast 1912 crop Air Dried Consumnes Hops, as per telegraphic sales made you on August 26th, and August 29th, respectively.

Please be good enough to sign all three contracts of each set and return two of each set to us.

If you do not wish the sharing clause (clause 18) of the contract, please strike it out, and in that case the elimination of that clause will be satisfactory to us.

We appreciate your orders and confidently expect that the contract will result in a considerable profit to your good selves.

At this time we beg to suggest again the advisibility of your contracting a further quantity of 1912 crop and especially as to your contracting for a term of years beginning with 1913 and on such a contract we will make you a specially low price.

Faithfully yours,
E. CLEMENS HORST CO.
E. C. HORST.

ECH/J.
Encls.

P. S.—Also enclose contract in triplicate covering 500 bales 1911 crop Choice Brewing Pacific Coast Air Dried Consumnes Hops, as per sale of August 23d.

The enclosed drafts read as follows:

HOP CONTRACT.

(Written across face: "Duplicate.")

(1) Parties: Memorandum of agreement made by and between E. Clemens Horst Co. (a corporation), Hop Growers, hereinafter [171] referred to as the

"Seller" and Pabst Brewing Co., of the City of Milwaukee, Wis., hereinafter referred to as the "Buyer."

(2) Quantity: The Seller agrees to sell to the Buyer One Thousand (1,000) Bales Hops about equal to or better than Choice Brewing Pacific Coast Air Dried Consumnes Hops of each of the crops of the years 1912.

(3) Place of Delivery: Said hops to be delivered on or at cars or *ex* dock or store, Milwaukee, Wis., or at the Delivering Lines' Terminals convenient thereto.

(4) Price: Buyer agrees to pay on each bale of hops at the rate of Twenty (20) cents per lb. (Tare 5 lbs.) Plus Freight from Pacific Coast. Terms Net Cash or Sight Draft against Bill of Lading.

(5) Time of Shipment, etc.: Time of shipment and/or delivery during the months inclusive of September to December following the (262) harvest of each year's crop, and such extra time as provided in paragraphs 12 and 16 endorsed hereon.

(6) Separate Bales: It is agreed that this Contract is severable as to each Bale.

(7) Default.

The Seller may treat entire unfulfilled portion of this contract as violated by the Buyer upon or at any time after Buyer's refusal to pay for any hops, or any note or acceptance given in payment for Hops that have been delivered and accepted hereunder, or if this contract or any part of it is otherwise violated by the Buyer.

(8) Conditions. This Agreement is subject to the printed conditions endorsed hereon.

Dated: Dated at San Francisco, Aug. 29th, 1911.

(Seal) _____,

_____,

For the Buyer.

E. CLEMENS HORST CO.

Per E. C. HORST,

Pres.,

For the Seller. [172]

To this was attached certain endorsements which include the following, viz.:

(10) Discount.

Upon or at any time after delivery of any hops hereunder, Seller shall be entitled to net cash payment for the same by allowing to the Buyer interest on the unpaid portion of the account (if the hops are sold on time) at the rate of 6% per annum for any unexpired term of credit. . .

(14) Difference in Quality.

Difference, if any, between quality sold and quality hereunder shall entitle Buyer to equivalent allowance but not to rejection of delivery.

(15) Claims, etc.

The buyer waives all rights to rejection or to allowances on any delivery on account of quality unless such claim be delivered to Seller by telegraph or in writing within 5 days after arrival of the hops at the place of delivery, and unless such claim be so made prior to Buyer's exercise of any right of ownership of the said hops.

The Pabst Brewing Company never signed either of said agreements or any similar agreement. I was familiar with the paper marked purchase order #54,808, dated September 8th, 1911, by H. J. Stark, Secretary, which paper read as follows:

PURCHASE ORDER. No. 54808

PABST BREWING CO. Req. " C. Z.
Dept.

Milwaukee, Wis., Sept. 8, 1911.

E. Clemens Horst Co.,
San Francisco, Cal.

Please forward the following to Chestnut St. Depot Via C. M. & [173] St. P. These goods must reach us. Shipments to be made during October, November, December, January and February. (102)

2,000 bales choice air-dried Consumne California Hops, Crop 1912, at 20¢ per pound f. o. b. Coast.

We insist on submission of samples and approval thereof before shipments are made.

Mail bill at once, putting PURCHASE ORDER NUMBER thereon. Also mail BILL OF LADING with weight and through freight rate. All goods are received subject to our count or weight and inspection. Terms: Cash, less 2% 10 days after goods are delivered or on or before 10th of month following purchase; otherwise settlements are made on the 22d of each month following purchase of goods. All freight charges must be prepaid.

If you cannot ship so that goods will reach us on

the day specified above, notify us at once, giving date on which you can ship.

PABST BREWING CO.
H. J. STARK,
Secretary.

To the best of my recollection, Purchase Order #54,808 was never returned by E. Clemens Horst Company. I do not recollect any correspondence or negotiations between plaintiff and ourselves respecting purchase order #54,808, after it was sent to the plaintiff. A thorough search has been made for a letter from E. Clemens Horst Company and between Sept. 8th, 1911, and Sept. 28th, 1912, and none has been found.

I remember receiving a night lettergram dated October 9th, 1912, samples 1 to 20 when received were inspected by Mr. Zaumeyer, as to quality. After he had inspected them he reported to me if [173½] they were in his judgment, what they should be in quality. He always reports to me the quality of the samples that are sent in whether they are or are not up to quality. He reported that samples 1 to 20 were not up to quality. They were not choice. I remember that the Pabst Brewing Company sent the telegram dated October 9th, 1912, saying that the samples showed no life. Picking poor, and the like. I remember letter October 10th, 1912, from defendant to plaintiff and receipt night lettergram, dated October, 1912, from plaintiff, and also letter dated October 14th, 1912. We sent the four samples so-called choice Consumnes hops therein referred to, to plaintiff. I

(Deposition of Gustav Pabst.)

remember seeing night lettergram dated October 15th, 1912, and letter of the same date. I remember sending night lettergram dated October 21st, 1912, reading as follows:

Milwaukee, Wis., Oct. 21–12.

E. Clemens Horst Co.,

San Francisco.

Will accept hops on contract equal to four samples you received from us, but insist upon you forwarding samples of deliveries before shipments go forward.

PABST BREWING COMPANY.

I recall the receipt of letter dated October 29th, 1912, from plaintiff, reading as follows:

San Francisco, Oct. 29th, 1912.

In reply refer to H–57158.

Pabst Brewing Company,

Milwaukee, Wis.

Gentlemen:—

1912 CROP HOP SALES.

Received your favor of the 23d inst.

By special Delivery mail we send you to-day a line of samples #25 to 38, inclusive, equal to which we are ready to make [174] deliveries to you.

We have just satisfactorily completed a 1500 bales delivery of 1912 choice hops to one of our Middle West clients. These 1500 bales were on the same line of samples sent you.

Faithfully,

E. CLEMENS HORST CO.

ECH/J. E. C. HORST.

(Deposition of Gustav Pabst.)

I have been engaged in the brewing business since 1884. Of course, from my experience and occupation I have acquired a general knowledge of the hop market conditions. I am familiar with the purchase of hops by samples. Each of the four samples forwarded by us were the part of a sample. The other part was kept in our storage house in possession of Mr. Zaumeyer. The line of samples referred to in the letter of October 29th, exhibits 25 to 28, were received by the defendant. Basing my answer upon my knowledge and experience and understanding of the hop trade and business, it is not commercial usage to buy or accept delivery of 2,000 bales on one partial sample.

Q. You may state whether or not, all of these samples 25 to 38 were choice.

A. There was one small sample in the lot that was choice. A very small sample. It would not be practicable to purchase or accept the delivery of 2,000 bales of hops upon the submission of one partial sample, such as 25 to 28, because I do not think any man could pick up 2,000 bales of hops, that would be identical with any one sample, large or small. I do not recall ever having bought to exceed 75 or 100 bales on one sample. Samples 25 to 38, with the exception of one small sample were not of the same high quality as the four samples because large variations are bound to occur in large deliveries. I remember sending lettergram dated [175] November 4, 1912, to plaintiff. This telegram refers to samples 25 to 38, or for that matter, to all of them. It covers the entire

(Deposition of Gustav Pabst.)

transaction, but that is the cancellation of the contract which were sent to Horst at their request. We were convinced after the attempts made by Mr. Horst to comply with the terms of the contract in sending us samples, which he did, and which were not acceptible, that he either could not or would not deliver such hops as were specified, and, as the market price of [176] hops was on the incline and we had to have large quantities of hops, we had to buy in the open market, and in order not to overstock, of course, had to cancel the contract with Horst. My entire experience in buying hops has been more of a supervisory nature than one of actual purchase, and that covered California, and State hops, Wisconsin hops and imported hops. I do not think we have used any large quantities of Cosumnes hops in our brewery. I could not estimate how many bales we had used. We bought some of the 1911 crop from Mr. Horst. We generally buy a special kind of California hops. We bought Sonomas, Russian Rivers; I do not think there would be any difference between the better grade of the Sacramento hops and the same quality of Yakimas. The same would be true of Oregon. One must make it his business to be absolutely certain in making a distinction and being able to pick the various kinds of varieties. You may have a thin California hop with very little lupulin, and you might find a heavy hop with a large quantity. You may find the same condition in New York State. The New York hops generally sell better than the Pacific Coast. Some-

(Deposition of Gustav Pabst.)

times there is a difference of 25¢, and sometimes more. Whether they are better for brewing purposes depends entirely upon what the brewer wants to produce. There have been many discussions as to the quality of the various hops which are grown. We have grown a hop here that we considered in point of results equal to any imported hop we have been able to buy, and the fact of the matter is that it cost us just as much to raise it as we could buy imported hops for. We are not in the hop business, except as buyers. We sell at infrequent intervals. We usually buy our requirements here. I was quite willing to sell a portion of this 2,000 bales Cosumnes. I do not know whether I talked with Mr. Horst upon the subject or not. I know there was some correspondence on the subject. I do not remember whether I [177] made any proposition to Mr. George about the price for which we would sell the Cosumnes hops. I presume from the reference to letter of September 28th, there must have been talk about me selling, with him. I do not think we offered to sell. On October 15th, we wired Mr. Horst that we must see (273) the samples Cosumnes delivered equal to four samples, because we expected to dispose of the same on coast, but we did not necessarily mean, we expected to sell a part. We intended, in the first instance, to sell some of them, but we are not in the business of buying and selling hops. We were convinced that the price at which we were buying them was very low, 20 cents a pound. We expected either to make a profit on them by either disposing of them or having enough to carry

(Deposition of Gustav Pabst.)

us over, that is, carry us over into the following year, but we considered the price of 20 cents a very low price at the time. I do not recall that Mr. Horst has showed us he could sell them for 25cents, but I am inclined to think not. I would not deny or affirm that I fixed the price at 27 cents, but I do not remember. I would not say. It is quite possible that I would not put it that way. I do not remember. When you show me telegram from E. Clemens Horst, dated September, 1912, saying, "we cannot accept your offer to repurchase thousand bales Cosumnes hops at 22 cents as we are selling below that figure. Please wire," it does refresh my memory. I have had so many interviews at different times with various people on this and on other hop situations and matters that I would not say. I can refresh my memory from this. I think Mr. Zaumeyer made some attempt to dispose of a portion of the hops, but he did not go out for that purpose. He went out for some other matters and incidentally he may have had some conversation with some people upon the prospects of this sale. I have some recollection of it, but not as to date, or just when these offers were made or when these various conversations were had. [178] I cannot distinguish by examining samples whether hops are kiln-dried or air-dried. I can tell if a hop is too dry and I can frequently detect by the odor whether a hop is over dry. The particular reason I objected to samples 1 to 20, was that a great many of the samples were broken, indicating possibility that they had been baled when they were too dry, and because they were not up to the

(Deposition of Gustav Pabst.)

choice quality. They were not in color and lupulin. Some of them had sufficient lupulin, but not the right color. I rejected them finally on the finding of Mr. Zaumeyer, in fact altogether. I cannot leave him out, because he is a factor in the matter. I go by Mr. Zaumeyer's judgment, because that is what he is employed for, because he is an expert in that line. I inspected them for myself. The fact of the matter is that I inspect or look at very few samples that are submitted because Mr. Zaumeyer attends to that altogether. When he accepts samples, I frequently look at them, and when I reject samples as a rule I look at them. I tested the flavor of most of these samples. I do not say that I tested each and every one. I am not in a position to qualify as an expert, and I am not relying on my judgment in the matter entirely. The fact of the matter is my own judgment plays a minor part in the acceptance or rejection of any samples submitted. Later I inspected in the same way samples 25 to 38. They were called to my attention by Mr. Zaumeyer, and I looked them over, yes, I tested some of them, most of them, and found the flavor lacking in some of them. I cannot detail at this time the different findings of each and every sample for some of them may have been good in some respects and bad in other respects. Some of them lacked in luster, color and life. I have always accepted Mr. Zaumeyer's judgment on the quality of hops. [179]

Direct Examination.

(By Mr. SPOONER.)

In the months of November and December, 1912,

(Deposition of Gustav Pabst.)

we purchased hops, due to the alleged failure of the plaintiff to deliver us hops as required by the agreement. We bought hops in November and December, 1912, from P. A. Livesly & Company and C. C. Sweeney & Company. I refresh my memory from the original papers received from them. The papers shown me are accounts received by Pabst Brewing Company at the dates each of them bore date. These statements were received by Pabst Brewing Company. I remember the receipt of the statements. I know the facts in the matter and I refer to the papers only as to the quantity which were purchased. I know we bought from both Sweeney and Livesly, during the months of November, 1912. This is very fresh and very vivid in my memory. I also recognize the checks and vouchers of the Pabst Brewing Company given to pay these bills. The check of the Chemical National Bank of New York, dated January (283) 29th, 1913, serial number 62,980, signed by the Pabst Brewing Company was in payment of the bales of hops purchased from them, C. C. Sweeney & Co. Check for $12,316.89 to C. C. Sweeney & Co. was in payment of these bills. I also recognize the statement of accounts of T. A. Livesly & Company. They are the bills received by us from T. A. Livesly & Company for the purchase of hops in November and December. The hops therein referred to were received by us and that is the correct statement of the account and price. I also identified check Pabst Brewing Co., dated January 29th, 1913, in payment of the bills received from Lovesly, marked BB and CC. The bills cor-

(Deposition of Gustav Pabst.)

rectly state the amount and price of the hops therein referred to and the same were delivered to us in the due course of business and I recognize the bill of C. C. Sweeney & Company, dated [180] November 21st, and check in payment of the bills. These hops were received and paid for as specified, and the check was paid. The bills and checks correctly state the amount and price, and to my knowledge the hops therein specified were received as specified.

The prices therein stated were correctly stated, and the amounts stated in the checks were actually paid to the payees therein named. We purchased these hops because we required them. We had to have them in our business and to replace the hops which under the contract with E. Clemens Horst Company failed to deliver to us.

The hops purchased by us were as follows:

From T. A. Livesly & Co., on Nov. 25, 1912, 100 bales containing net 19,332 lbs. at 21¢ per lb., delivered.....Total	4,059.72
Less freight	297.50
(284) Net	3,762.22
On Dec. 24th, 1912, 80 bales of hops containing 16,496 lbs. at 23¢ per lb. delivered .....Total	3,794.08
Less freight	292.26
Net	3,501.82

(Deposition of Gustav Pabst.)

On Nov. 25, 1912, 156 bales hops, containing 31,083 lbs. at 23¢ per lb. delivered	Total	$7,159.09
Less freight		487.50
Net		$6,661.59
On Nov. 25, 1912, 100 bales hops containing 19,441 lbs. @ 22¢ per lb. delivered	Total	4,277.02
Less freight		301.50
Net		3,975.52
From C. C. Sweeney & Co., on Nov. 14, 1912, 13 bales hops containing 16,837 lbs. @ 22¢ per lb. delivered	Total	$3,704.14
Less freight		259.53
Net		$3,444.61

[181]

From C. C. Sweeney & Co., on Nov. 13, 1912, 89 bales hops containing 16,988 net at 22¢ per lb. delivered	Total	$3,737.36
Less freight		261.53
Net		$3,475.83
On Nov. 21, 1912, 250 bales hops containing 47,385 lbs. @ 22¢ per lb. delivered		
Total		$10,424.70
Less freight		741.25
Net		$9,683.45

(Deposition of Gustav Pabst.)

Check Pabst Brewing Company, Milwaukee, Jan. 29, 1913, #62980. Pay to the Order of C. C. Sweeney & Co... $9683
45/100 Ninety six hundred eighty-three and 45/100 Dollars.

To Chemical National Bank, New York.

PABST BREWING COMPANY.
By I. M. EWING.

Check #62981, $10163.41. Payable to C. C. Sweeney & Co.

Check #62861, $12,316.89, payable to C. C. Sweeney & Co.

Hops purchased from C. C. Sweeney & Co., on Nov. 15, 1912. 150 bales hops containing 26379 lb. @ 22¢ per lb. delivered .....Total $5,803.38
Less freight 406.93

5,396.35

Check #62,862, for $7,737.74, payable to C. C. Sweeney & Co.

Cross-examination.

(By Mr. FOSTER.)

These bills were taken out of our files. They have been checked over by our people who do these things and have charge of the various matters, and the checks have been made out in the regular routine, and are genuine, and are in payment of these bills, being the same as the checks, and the checks denote that they were [182] cashed and cancelled and the

(Deposition of Gustav Pabst.)

money received therefor by the payee who sold us the hops.

Q. When you sent out samples 21 to 24 to the Horst people, which samples I now show you, marked Defendant's Exhibits 21 to 24, you were willing to accept from the Horst Company 2,000 bales of the hops equal to any one of those samples?

A. Yes, sir. When we received back from the Horst people samples marked 25 to 38, inclusive, we examined those samples and found that one of them was equal in quality to 21 to 24 which we had sent out. Examining the samples now, I am not able to state which one of the three samples selected from those numbered 25 to 38, inclusive, is equal in quality to four samples 21 to 24. I have not sufficient familiarity with hops to determine that. I would not be able to tell which of the three Horst samples is the choicer hop. I do not assume to distinguish between a prime hop and a choice hop from an inspection of a sample—nor whether the particular sample is air-dried or kiln-dried. I cannot answer whether sample 35 now shown me, would be considered a choice hop or whether I would judge it as being dirty. Because of the failure of the plaintiff to deliver us under the contract and because of the fact that we could not wait any longer to lay in our necessary supplies we went into the open market and bought hops for our use. The contract for the purchase of 1912, as evidenced by our purchase order No. 54,808, to plaintiff and the correspondence relating thereto. It subsequently states that shipment must

(Deposition of Gustav Pabst.)

reach us during October, November, December, January or February. One of the sales from Sweeney was made for 332 bales on November 4th and the price was 22¢, less freight Milwaukee. It was made from a sample. It is the same Mr. Sweeney who furnished us samples 21 to 24. I do not know where the goods in this 332 bales were grown, except that [183] they were grown on the Pacific Coast. These hops were not bought for speculation. We are not in the business of buying hops for speculation. I did not buy the Horst crop 1912 to resell but I said I would consider the matter of resale, or a part of them possibly, even when we bought them. I might have had some probably undeveloped and not clearly defined thought in my mind. I considered the purchase at that time, at the price, a very good buy, and I think so today and it was a good buy. I do not remember that I made an attempt to sell 1,000 bales of this order on the coast.

Testimony of Irving S. Marks, for Defendant.

IRVING S. MARKS, called for defendant, sworn, testified as follows:

I am a commission dealer in hops. Have been such for 20 years. Been buying and selling in the Sacramento market all that time and have also bought and sold in all sections of California. Was familiar with the market price of hops during the year 1912 and for five years prior to that time I was buying mostly. I was familiar with the price of hops in the Sacramento market in the year 1912. In November,

(Testimony of Irving S. Marks.)

1912, price was 18 to 19 cents f. o. b. Sacramento and in order to get the price to a brewer in Milwaukee you would have to add the freight and buying and selling commission. [184] On November 4, 1912. the market price of choice Consumnes hops in Milwaukee would be 22 to 23 cents. In Sacramento 18 to 19 cents.

Cross-examination.

(By Mr. DEVLIN.)

The price to the grower in November, 1912, for choice Consumnes was 18 to 19 cents. It is a customary margin of about 4 cents between the dealer in Sacramento and the brewer in Milwaukee.

The COURT.—What does this 4 cents cover?

A. It covers freight and buying and selling commission, and a small profit to the dealer who makes the sale. The average profit to the dealer would be 1½ to 2 cents a pound. May be a little less or a little more. The brewer pays more than the dealer; possibly two cents; possibly a little less. It depends upon the conditions. I examined the hops samples 1 to 20 at the last trial. I pronounced one or two samples prime. I think 1¢ to 1½¢ would cover the difference in quality between prime and choice. I base my value of hops on orders that we had to buy at that time and the purchases were made at that time. Of the samples 1 to 20, some ran better than others. I did not see any of those hops that I would call choice. They were all prime. There were some prime and some medium to prime. Medium is a

(Testimony of Irving S. Marks.)

lower grade than prime. That would make three cents between them and choice.

Q. What would be the effect on the market of putting say 2,000 bales of hops out to be sold; putting them suddenly on the market—What would be the effect as to the raising or lowering of the price?

Mr. POWERS.—We object to that as immaterial, irrelevant and incompetent, and not at issue in this case, and not addressed to market value.

The COURT.—The objection is overruled.

Mr. POWERS.—Exception.

EXCEPTION No. ——.

A. It would depend upon the quality of the hops.

Mr. DEVLIN.—Say the hops were not choice.

Mr. POWERS.—We object to that as not being directed to any issue in this case. The issue in this case is Consumnes hops. Objection overruled and excepted. [185]

A. It would be somewhat difficult to sell them all at one time, that is, in a short time. It might take 4 to 6 weeks; you might do it in less. Hops of this quality would not sell as readily as choice hops. They would take longer to sell. In November and December, 1912, I was in Sacramento and kept familiar with the trade. It was my business. The market was somewhat inactive in November, but was quite active in December. The price of hops when the market is inactive is not necessarily lower. Very often the market is very much more active on the decline than on the rise, because it is easier to buy

(Testimony of Irving S. Marks.)

on the decline. The market was pretty firm in November, 1912, for choice variety. You could sell prime varieties from 1 to 1½ cents lower. There was a considerable demand for choice hops. It was not so active for the other kind of hops. I took deliveries of some choice Consumnes hops that we bought at 18½ cents. Mr. Spicer got them at 18½ cents. Mr. Spicer got them at 18½ cents from the Jacks people. There were 40,000 or 60,000 pounds, about 300 bales. Since the last trial I refreshed my memory and came across an order, or a notation to make a shipment of Jacks hops. If hops are bought by the dealers they would necessarily be sold to the brewers. It is customary to pay a solicitor 1½¢ per pound plus travelling expenses. The brewer pays the top price; according to conditions he may not pay the top price but under ordinary conditions he may pay about 2 cents a pound above what the dealer pays; it may run higher. If the dealer buys from another dealer, he expects to buy at approximately the same price he would buy from a grower.

On the former trial I think I fixed a price of 17½ to 18 cents on choice Consumnes hops. I said now 18 to 19 cents. There has to be a margin in the price because the market is not stationary all the time; it fluctuates quite a lot; it can be 17½¢ today and 18¢ tonight, and 18½¢ tomorrow. At the former trial of this [186] case I testified that the price of hops here in Sacramento was 17½¢ to 18¢. In reading over some of my correspondence I came across several lots. One of these is the Jacks lot, which I know

(Testimony of Irving S. Marks.)

was bought at 18½¢ which I might have overlooked. Besides the Jacks lot of hops I saw another lot of choice Consumnes hops bought in Sacramento about that time at 19 cents a pound. The price I make at Milwaukee is not based entirely on a specific sale. I come in contact with a great many growers a great many times during the season. [187]

The COURT.—I suppose everybody that is in the business knows more about the business than merely flows from his own individual transactions.

A. He comes in contact with the growers.

Redirect Examination.

(By Mr. POWERS.)

Q. You said the market fluctuated sometimes 2 or 3 cents a day. Was there any fluctuation in the market in November or December, 1912, for Consumnes hops?

A. There was between the 4th of November and 13th of November; on the 4th of November I sold 53 bales of hops at 17 cents; they were not choice Consumnes, but they were called choice Consumnes; it was a small lot; I sold them at a little less than I could have got a little later. On the 13th of November there were transactions in those of an equal quality at 19.

A. It fluctuated to some extent from 17¢ to 19¢ during the first half of November to the grower.

Testimony of Charles Zaumeyer, for Defendant.

CHARLES ZAUMEYER, called for defendant, sworn.

I am a hop buyer for the Pabst Brewing Company and have been buying and selling hops for 22 years. Prior to that I was connected with G. J. Hensen & Company for 12 years and kept track of the market for hops in Milwaukee and vicinity during all of that time. Market value of choice Consumnes hops in Milwaukee on November 4, 1912, was about 22½ cents.

Cross-examination.

I am employed by Pabst Company. I examined the Horst hops that were sent in 1912 and I rejected them. The Horst hops known as samples 1 to 20 ran common to prime. The several qualities of hops are choice, prime, medium and common. The price in Milwaukee of choice Consumnes hops was 22½ cents. Prime hops are worth 2 cents less than choice, medium about 2 cents less than prime and [188] common about 3 to 4 cents less than medium. Common hops would be worth about 7 cents less than choice hops. Mr. Horst's hops by the samples were sent us were common, some medium and a very few were prime. The market price of those hops would be from 6 to 7 cents below choice hops at Milwaukee. I base my opinion on market reports, offers that we have from different growers and dealers. T. A. Lively & Company, C. C. Sweeney & Company, Falk, Wormers Co., M. Kane, New York Pacific Hop Company all offered to sell us choice hops at that time.

(Testimony of Charles Zaumeyer.)

They were not Consumnes hops. We asked for prices of choice Consumnes hops and they were furnished us at 22½ cents. The brew master wanted them. We asked for the prices of Consumnes hops after we rejected the Horst hops. We wanted to see what the other dealers were offering the line of Consumnes hops for. We had to have some choice hops and we had to go into the market and buy them when we got quotations on hops and we talked about prices at that time.

Q. From whom did you get prices?

A. Mr. Sweeney.

Q. Is that all? A. He is the only man I asked.

Q. So, therefore, your information about that depends upon Mr. Sweeney? A. Yes.

The COURT.—Are you an expert judge of hops by sight, by their appearance?

A. Yes.

Q. Are these four samples that were sent out here by the defendant to plaintiff on that table?

Mr. DEVLIN.—Yes.

The COURT.—I wish you would pick those four samples out that you sent out here as being choice hops.

A. All of the samples there, you mean?

Q. No, I am asking you about the samples that you sent out here. Pick them out from that lot of hops. [189]

Mr. POWERS.—They are already picked out.

The COURT.—I asked if they were on the table.

(Testimony of Charles Zaumeyer.)

Mr. POWERS.—They are on the table, your Honor.

Mr. DEVLIN.—I will ask for them to be put on the table and mixed up to see if he can tell them.

The COURT.—I want to have them placed on the table among the others with the witness not present.

Mr. DEVLIN.—The four samples are on the table.

The COURT.—I want to test his ability to pick out the hops.

Mr. DEVLIN.—Mr. Horst says they are on the table.

The COURT.—Then pick them out, Mr. Zaumeyer?

A. They are amongst these. They have not got the color any more. They have been open. They are not our samples. These are Horst's samples.

The COURT.—But they contain, as I understand, the four samples that you sent to Horst. I want simply your judgment as to which ones of those samples represents those that you sent out to him as representing choice Consumnes hops.

Mr. POWERS.—We object to that on the ground that the samples at the present time are not in the same condition.

The COURT.—Very well, I will not insist upon it. It is only a fair test to put the witness to. You can take your own course.

Redirect Examination.

(By Mr. POWERS.)

Q. Mr. Zaumeyer, with reference to the samples on the table, are they in a condition where an expert

(Testimony of Charles Zaumeyer.)

could decide between them?

A. No expert on earth.

Q. They have been exposed five or six years?

A. They have lost their flavor, they have lost their color; the only thing that [190] shows today is the dirt.

The COURT.—Each one of these samples, by its exposure and handling, has deteriorated in color, hasn't it? A. Yes.

Q. Then there ought to be the same relative ability to distinguish between the grades that there was when they were fresh, if they had deteriorated in in kind. All I asked you was to indicate to me those that you thought did represent choice hops that you sent to Mr. Horst.

A. That could not be done at the present time.

Mr. POWERS.—Q. Mr. Zaumeyer, with reference to the price of hops, what is the relative price of Yakima and Consumnes hops in the Milwaukee market?

A. Approximately the same. Yakima and choice Oregon bring about the same price. I bought some Yakimas paying 21, 22, 23 cents for them in the Milwaukee market.

Testimony of Otto Koch, for Defendant.

OTTO KOCH, called for defendant, sworn, testified as follows:

I am a farmer and hop dealer. Have been connected with the hop business for the last five or ten years buying and selling on commission. Have

(Testimony of Otto Koch.)

dealt in hops all over the Sacramento section, Yolos, Consumnes, Wheatland and all kinds of California hops in the Sacramento market in the year 1912. I bought some choice Consumnes hops about November 4, 1912, for 19 cents a pound, and the market value at that time was 19 cents a pound. The price to the growers was from 17½ to 19 cents a pound. I bought them for George Proctor, for Lilienthal, Faulk Wormser and E. Magnus Company.

Cross-examination.

I got an order to buy a lot of hops and I think it was 200 bales, in November, 1912. I bought about 1,100 or 1,200 bales. Not in November, but between September, October, November, December, January and February, 1912. I bought them in the open market, the price in September and October was 25 cents; from 25 cents to 19 cents in November, which was quite a drop. The orders I got [191] from the dealer were to buy at certain figures in November. The lowest was 17½ cents, but the only transaction I closed was one for 19 cents. Prime Consumnes hops in the market would be worth from 1 to 1½ cents less than choice, medium 1½ to 2 cents less than prime, common hops, would be possibly 2 to 4 cents less than medium.

Recross-examination.

At that time had orders for several hundred bales of the best hops which I bought.

Q. Wouldn't your experience teach you that a grower would have hard work to sell 2,000 bales un-

(Testimony of Otto Koch.)

less he found brokers who had orders for such hops?

A. I could not answer that, but during that month I bought over 1,100 bales of hops. In November and December, 1912, the price paid for them ranged from 17½ to 18 and even 19 cents a pound.

Testimony of John M. Spicer, for Defendant.

JOHN M. SPICER, called for the defendant, testified as follows:

I am in the hop buying business. Have been since 1890. My principal place of business is in Sacramento. Was familiar with the price of choice Consumnes hops in the Sacramento market on November 4, 1912, or thereabouts. I bought three lots of hops at that time at 18 cents. The market price at that time was 17⅝ cents to 18½ cents to the grower.

Cross-examination.

I work for the firm of Wolf, Netter & Company. I do not have anything to do with the brewers or any outside business at all. There is not much difference between Yolos and Consumnes. Prime hops were from 1½ to 2 cents less than choice. In November, 1912, I was buying for Wolf, Netter & Company in the Sacramento Valley, but I can't remember whether or not on November 18, 1912, I bought [192] 167 bales of choice hops for them at 16¢, or whether or not on December 7, 1912, I bought 100 bales of choice hops for them at 15¢, or whether or not on December 9, 1912, I bought for them 300 bales choice Yolos at 15¢, or whether or not on December 10th I bought for them 209 bales of choice Yolos at

(Testimony of John M. Spicer.)

15¢. I know we bought a lot of hops up there, but I can't remember the price.

Q. Do you remember about the price of 15¢ at all?

A. I do not remember the price; I did not keep track of it. I do not remember purchasing for my firm on December 12, 1912, 100 bales of choice Yolo hops at 15¢, or that I bought for them on December 30, 1912, 140 bales of choice hops at 14¾¢. I do not remember the price. I can only remember the one transaction in December, 1912, which I have mentioned.

I did buy Yolo hops in November and December of 1912. I bought some from Casselman; we buy lots up there; I can't remember that; as I say, I do not keep a record of them.

Q. Would it help you if I got the names of these people?

A. As I say, I do not keep a record of anything I buy.

Thereupon the depositions of the witnesses whose testimony was taken in Chicago were read in evidence as follows: [193]

Depositions taken in Chicago in August, 1917, of the following witnesses: M. D. Wormser, Mark J. Murphy, G. G. Schumacher and Rudolph Keitel.

Deposition of M. D. Wormser, for Defendant.

M. D. WORMSER, *called a witness* for defendant, sworn, testified as follows:

Direct Examination.

(By Mr. POWERS.)

My name is M. D. Wormser, and I am Vice-president of the firm of Falk, Wormser & Company, dealers in hops and brewers' supplies in Chicago. We cover practically the whole of the United States, although we go no further east than Buffalo. I have been in the business for fifteen years and am familiar with the market value of hops in the territory named, including Milwaukee. Milwaukee is eighty-five miles from Chicago. The Chicago market for hops of the character of Cosumnes hops is the same as the Milwaukee market. I have been familiar with those prices ever since I have been in the business. I know the Cosumnes hops grown in California. The reasonable market price in Milwaukee of strictly choice Cosumnes hops on November 4, 1912, or thereabouts, was from twenty-two to twenty-four cents a pound. Twenty-two cents we would call price. Choice would be twenty-four cents. A choice hop is strictly choice and a prime hop is not as good in quality. A fair average, normal price for strictly choice Cosumnes hops on November 4, was twenty-four cents. The market was very firm on account of prices being abnormally high the year before, and brewers were ready buyers of hops during that month. We could have disposed of two thousand

(Deposition of M. D. Wormser.)

bales of that character of hops in the early part of November, say from three to four weeks. So far as the sale of choice hops was concerned there was a great demand in 1912 because brewers had brought very sparingly the year before on account of high prices. The price of choice hops did not decrease [194] after November 4, for the next few weeks. My firm handled in sales annually eight to ten thousand bales a year during 1912 and four or five years next before that time. I am familiar with the various trade journals which were current in November, 1912. They were the "Brewers' Daily Bulletin," the "American Brewers' Review," the "Western Brewer" and the "Brewer and Maltster." The prices that were quoted in these papers for hops were accepted by the trade in Chicago and vicinity, including Milwaukee, as the current market price of hops. They are authentic and accepted by the brewers as reliable. In the conduct of our business it was necessary for me to be familiar with the current and controlling prices for hops of the character of Consumnes during the year 1912.

Cross-examination.

(By Mr. LEWIS, Acting of Counsel for Plaintiff.)

We have sold hops to the Pabst Brewing Company in former years but did not sell them any hops in 1912. We did not sell hops in Milwaukee in November, 1912, or the next month or two thereafter. I do not think that brewers in Milwaukee were generally bought up. We very seldom make Milwaukee, but I am familiar with the prices at Milwaukee because the

(Deposition of M. D. Wormser.)

prices are the same in Milwaukee as in any other city, because the freight rates are the same. The prices are no lower in Chicago than in any other city. We sold hops in other cities at that time but we make Milwaukee very little. I have no recollection whatever of the conditions which existed in 1912, November or December, in the hop trade in Milwaukee, as to the demand from brewers and the supply of hops to brewers. There was a good demand for hops at that time in the immediate vicinity of Milwaukee, that is, in Chicago and the rest of the territory that our salesmen covered,—Wisconsin, Indiana, Michigan and Ohio. I do not know the freight rate from either Milwaukee or Chicago [195] to any of these other points which I mentioned as furnishing a market for hops at that time. I cannot give the exact or approximate number of bales that our firm sold in the vicinity of Milwaukee during November and December of 1912. We wrote a letter to Mr. Abraham Meyer stating the prices at which they were sold.

Mr. LEWIS.—We will ask that letter to be filed. Refer to a carbon copy of the letter which was produced. The letter reads as follows: [196]

Chicago, July 19, 1917.

Mr. Abraham Meyer,
c/o Mayer, Meyer, Austrian & Platt,
208 So. La Salle St., City

Dear Mr. Meyer:

The dictator, our Mr. Falk, acknowledges receipt of your yesterday's valued favor, and contents noted.

(Deposition of M. D. Wormser.)

In reply to same, beg to state that I don't think I shall be in the city the latter part of this month, but in order to assist you, I have taken pains to look up our records and herewith give you the following details, which are bona fide, and ought to assist you the same as if I were there in person;

According to our Sales Book, the selling price of Prime to Choice Hops during—

November, 1910 averages about 16¢ per lb.

" 1911 " " 45¢ " "

" 1912 " " 23¢ " "

" 1913 " " 26¢ " "

" 1914 " " 14¢ " "

These figures are as nearly accurate as we can possibly give them to you, and probably that is what you desire. In this connection would state that we had some contracts in these different years at somewhat higher and lower prices. For instance, in November, 1911, we had contracts, made previous to that date, as low as 25¢ but of course this does not cut any figure as to the market prices at the time sales were made.

Trusting that this will give you the desired information, and always ready and willing to be at your command, I remain

Yours very truly,

(Signed) M. L. FALK. [196½]

Mr. LEWIS.—This letter was dictated by Mr. Falk and not by yourself, was it not?

A. It was, but I investigated the records from which that letter was made. I know the difference

(Deposition of M. D. Wormser.)

between Consumnes hops and the other type of Pacific Coast hops. They are greener in color than the Oregon hops. They haven't as many leaves and stems as the Oregon hops. The Consumnes hop, Russian River hop, Mendocino hop, Sonoma hop and American River hop are the same general type. The relative price of Consumnes hops, and Oregon hops, and Washington hops, and Mendocino hops, and Sonoma hops and Russian River hops, were about the same as Consumnes. Sacramento hops were a little cheaper than Consumnes. Choice Sacramento River hops in November, 1912, were worth twenty-one cents a pound, about two cents less than the other hops mentioned. The prices given by me are of sales made according to our records. I do not know approximately what was in 1912 the total production of Consumnes hops, and I do not know who bought Consumnes hops for use at that time. Sales of two thousand bales of Consumnes would be unusual, but divided, I think they could be sold in a period of four or five weeks. I do not know of a single customer of ours to whom we could have sold any portion of a lot of two thousand bales of choice Consumnes hops at the prices which I have stated as the market price at Milwaukee or in the vicinity. I have never tried; there is no such thing as a hop market in the sense of any exchange where hops are bought and sold, or in the sense of any board that fixes the price of hops, or any central regulating authority that fixes or did fix in November, 1912, the price of hops.

Q. Did any of these trade journals which you have

(Deposition of M. D. Wormser.)

mentioned actually quote the transactions that were made, or did they merely give their estimate of prices?

A. They gave their prices based on facts. [197]

Q. Please answer the question. Did any of them quote closed transactions or were they merely quoting their estimate of prices?

A. Quoting their estimate of prices. My firm deals in brewers' supplies besides hops. I do not know approximately how many bales of hops were consumed by Milwaukee brewers in November, 1912. We had very little trade in Milwaukee the past few years. If the public knew that hops on the market had been rejected by a large brewing concern such as the Pabst Brewing Company, it might affect the price. If they were forced on the market, they would probably have to be sold at some sacrifice. I cannot say approximately how many bales of hops are stored and carried from year to year by the brewers in Milwaukee and vicinity. It is a practice of the brewers in seasons of large production or low prices to store for future years. The hops stand storing and are so stored; I know that of my own knowledge. The time the hops are carried in storage varies. Some of them carry them from three to four years. Sales of two thousand bales of Consumnes would be unusual, but divided, I think they could be sold in a period of four or five weeks. One of the large Milwaukee brewers buys here in Chicago, the Blatz concern. That is a part of the United States Brewing Company. Brewers sometimes carry hops

(Deposition of M. D. Wormser.)

in storage for three or four years. I do not know of anybody to whom our concern could have sold as many as 500 bales of choice Consumnes hops at the price I have mentioned in November or December, 1912.

Redirect Examination.

(By Mr. POWERS.)

Hops were very high in the year 1911. I do not think anybody stored hops during that year. They just bought from hand to mouth, about what they needed. Most of the brewers had used up their stock in 1912. Brewers get their estimate of prices from the trade journal that I have referred to here as being familiar with. The brewers and salesmen of hops refer to those trade journals for current prices and the prices in those journals are accepted by [198] brewers as being approximately correct. The prices of hops in Milwaukee, in 1912, were the same as in all other places tributary to Chicago. Brewers are visited by hop men all over the country. Cosumnes hops are shipped direct from the Pacific Coast and the freight rates are the same to any point east of the coast in carload lots as the freight rates are the same to Milwaukee as to Chicago or Terre Haute. For instance, the price for the hops would be approximately the same. Strictly choice hops were in demand during the month of November, 1912.

Recross-examination.

(By Mr. LEWIS.)

We had no difficulty in securing that part of the Pacific Coast hops if we were willing to pay the price.

(Deposition of M. D. Wormser.)

The market having a distinguished tendence at the time. While the purchasers were not clamoring for hops there was a brisk demand for hops and hops could be sold much more readily than they could the year before on account of the extremely high prices, which in 1911 were between forty and fifty cents per pound, and in 1912 there was an abnormal demand for hops on account of the small stocks on hand and I think two thousand bales of choice hops could have been sold in Milwaukee and vicinity in four or five weeks without cutting the price.

Deposition of Mark J. Murphy, for Defendant.

MARK J. MURPHY, called on behalf of defendant, sworn, testified as follows:

My name is Mark J. Murphy. I am office manager for *Fal*-Wormser and Company and have been with them for thirteen years. Their business is dealers in hops and brewers' supplies. I have been familiar with transactions in buying and selling of hops in Chicago and vicinity during all that time. Milwaukee is about eighty-five miles from Chicago, and the market there for hops is the same as at Chicago. There is no difference in the sale price of Pacific Coast hops in Milwaukee from Chicago. Through my business [199] connections with the firm of Falk-Wormser & Company, I have been familiar with the sale price and market value of hops in the Milwaukee and Chicago markets for thirteen years. The market price of choice Consumnes hops on November 4, or thereabouts, in the Milwaukee

(Deposition of Mark J. Murphy.)

market and vicinity I am familiar with only in a general way. Consumnes hops are usually a cent below Sonomas. For instance, in looking over our books that year I think the price of Consumnes and Sonomas was about the same price. My duties as manager of my firm require me to keep track of the price of hops during the year 1912 and the years before that I kept the records of what we bought and sold and was familiar with the market and hop trade in general during that time and for thirteen years prior to that time I was familiar with the market prices of Chicago, Milwaukee and vicinity of Consumnes hops and hops of the character of Consumnes. There was no difference in the price of Milwaukee and Chicago and the market price of strictly choice Consumnes hops in Milwaukee and vicinity of November 4, 1912, and a short time thereafter was twenty-four cents. If they were just choice Consumnes hops the market would be twenty-three cents. The market was brisk at that time. In my opinion, it would have taken two or three weeks to have sold two thousand bales strictly choice Consumnes hops in that market, using diligence in selling. That time the brewer's stocks were depleted. The previous year the prices had been very high and hops sold for forty-five cents. I am familiar with the trade journal known as the "Brewers' Daily Bulletin." It is generally relied upon and the prices quoted in that paper are generally accepted by the trade as being accurate and correct. Through my knowledge of the hop business the market prices and the trade journal

(Deposition of Mark J. Murphy.)

in general I have found the quotations given in that paper reliable and they are generally so regarded by [200] the trade, and the prices therein quoted were accepted in 1912 by people buying and selling hops as being reliable quotations generally speaking. By generally speaking, I mean that some people do not go by that at all. There are certain brewers, I suppose, that go according to friendship a good deal.

Q. But how did the trade in general act with reference to those figures?

A. Well take them as being correct. The price between dealer and dealer and the price between dealer and brewer differ. There is an advance to a brewer generally. If hops are low there probably would be only a half cent difference. When hops are high it is probably one cent difference. As the market was in 1912 the price to the brewer would probably be a cent a pound more than that to the dealer.

Cross-examination.

(By Mr. LEWIS.)

The prices testified to were delivery prices. The personal relations between the brewer and the person from whom he bought only affects sales in very small instances. In 1912 the brewers were not contracted up much for the simple reason that prices were advanced high the year before and brewers, as a rule, do not contract at high prices. In the year 1912 our firm sold from ten to twelve thousand bales of hops. I do not remember any sales to have been made in Milwaukee by our firm but the prices in Chicago are

(Deposition of Mark J. Murphy.)

the same as the prices in Milwaukee and the prices in Kansas City. The freight rate is a blanket rate on hops. The trade do not quote the price of Consumnes hops; they do quote the price of Sonomas hops, and in 1912 Consumnes and Sonoma hops were about the same value. Strictly choice being worth 24¢ in both character of hops. When I testified to the length of time it would have taken to have sold two thousand bales of Consumnes hops I was not basing at what could have been done. I was basing it on the specific demand at that time. [201] I do not remember whether or not my firm sold that many choice Consumnes hops at that time. I do not know any brewer in Milwaukee or in the vicinity thereof, who was in the market for any quantity of Consumnes hops at that time. I do not know the quantity of choice Consumnes hops at that time. I do not know the quantity of choice Consumnes hops that were sold in the City of Milwaukee and vicinity, using vicinity in the same sense that I have used it heretofore, on November 4, 1912, and in the succeeding three weeks. I do not know what the demand was for Consumnes hops in the year 1912 in the City of Milwaukee or vicinity, as a total amount.

Redirect Examination.

(By Mr. POWERS.)

There was a good demand for Pacific Coast hops if they were choice at the time in question. The market was strong and Cosumnes hops are a part of the Pacific Coast hops. There was hardly any demand for common or medium hops, most of the demand was

(Deposition of Mark J. Murphy.)

for choice hops. If Cosumnes hops were offered for fourteen, fifteen or sixteen cents the inference would be that the hops offered were common in quality at that time. In November, 1912, there was a daily trade bulletin published in Chicago, the "Brewers' Bulletin," and that was the paper to which the brewers and dealers referred in order to get information as to the prices, and it was relied upon by them. The brewers in Milwaukee and vicinity were carrying a light stock of hops in 1912.

My recollection is that the demand for Pacific Coast hops was brisk in November, 1912, for choice hops, Consumnes or Sonomas and in November, 1912, the price of Sonomas and Consumnes was the same.

Recross-examination.

(By Mr. LEWIS.)

The journals referred to by me as being accepted by the trade did not attempt to show how many bales were sold nor what the [202] prices were for which they sold as definite transactions.

They secured their information and published the range of prices whatever it was as an interpretation of the facts which were reported to them by the dealer.

Q. They simply secured their information, whichever way they secured it, and gave an estimated price?

A. Not an estimated price. It is a range of prices, —a range of prices, from twenty-two to twenty-five, or twenty-one to twenty-four, or whatever it is.

Q. But I mean it was the journals' interpretation

(Deposition of Mark J. Murphy.)

of the facts as reported to them by the dealers?

A. Yes, sir.

I read the "Brewers' Bulletin" every day and am familiar with its contents relative to the price of hops.

Redirect Examination.

(By Mr. POWERS.)

I keep track of the records in the prices of this daily trade journal in my business and the information therein contained is correct with reference to the matters that I know of myself. In the month of November, 1912, the transactions that I knew about that were therein reported were correct. They quoted the prices that we gave them. That is, they took the prices we gave them confirmed it by other dealers. And the "Brewers' Bulletin" in November, 1912, correctly reported the prices which they got from us and other dealers. When I said the papers interpret the prices I meant they take the prices from one dealer and confirm it by other hop dealers. I did not mean that the figures quoted were the arbitrary interpretations of the editors.

Recross-examination.

(By Mr. LEWIS.)

There are two firms of hop dealers of sufficient importance to amount to anything in the trade in Chicago. One is my firm and [203] the other is A. Magnus & Sons Company.

Q. Mr. Murphy, did you investigate to see if Cosumnes hops were in November, 1912, quoted in any trade journal?

(Deposition of Mark J. Murphy.)

A. I did, but I could not find Cosumnes specified; no quotations on them at all. I could not find any in the trade publications. My firm sold 889 bales of Pacific Coast hops in November, 1912. I got these figures from my books. I have no recollection of the percentage of the Sacramento Valley hops, Oregon and Washington included in this sale. The delivery price ranges from 18 cents a pound to 25¼ cents a pound. The 25¼ cents price is on one five-bale lot. With that exception the highest price is 24¢. Of these 889 bales the greater quantity were sold at a delivered price of 22¢ or less.

During the month of November, 1912, my firm bought 959 bales of Pacific Coast hops. The price was ranged from 11½ to 19½ cents f. o. b. the cars on Coast. Of these 210 bales were California. I think they are Yuba. [204] My firm makes sales from Jacksonville, Florida, south, and as far north as the northernmost points in the United States. I do not know just what that is. I could not say we covered that area in November, 1912. I rather think our salesmen were not out at that time. We were not pushing sales during the month of November, because our salesmen were not out.

Redirect Examination.

(By Mr. POWERS.)

Our purchases during the month of November, 1912, in California hops consisted of one purchase of 210 bales at 19¼ cents F. O. B. Coast. That fixed the price to the brewer in Milwaukee at twenty-three cents a pound. The other sales were Oregon, Yaki-

(Deposition of Mark J. Murphy.)

mas. A lot we bought were not choice. The 19½ cent hops were choice. The Oregons that we bought we would not consider all choice. The only two choice ones we bought were Yakimas and the California. With reference to the sales made by us in November there was one lot which we sold at eighteen cents that were not choice. In November, 1912, we sold fifteen bales of choice hops at twenty-four cents, on November 2; ten bales at twenty-two cents on November 6; twenty-five bales at twenty-three cents, November 11th; 244 bales at 22 cents, November 8; 25 bales at 22 cents, November 7; 10 bales at 24 cents, November 12; 104 bales at 22 cents, November 19; ten bales at 22½ cents, November 10; 22 bales at 23 cents, November 22; 50 bales at 24 cents, November 23, 5 bales at 25¼ cents, November 26; 25 bales at 23 cents, November 25; 25 bales at 23½ cents, November 25; 15 bales 23 cents, November 27th.

In November, 1912, our firm was not attempting to sell hops merely because our Mr. Eckstein, who is the secretary of the firm, and has charge of the sales was on a vacation in California, partly buying. The sales from New York to Jacksonville and from Denver north are all of the same character. Probably one-half of our hops are sold as Pacific Coast hops and with reference to these Pacific Coast hops could be Cosumnes, Mendocino or Sonomas. [205] There would be no difference provided they were choice. The statement as to prices referred to in the letter which is signed by Mr. Falk are true. The custom with reference to delivery of strictly choice

(Deposition of Mark J. Murphy.)

hops, that are sold under the name of Pacific Coast hops is that unless the order applies specifically for one particular class such as Yakimas or Sonomas any Pacific Coast grown hops could be delivered provided it was strictly choice. Speaking from the standpoint of our firm, I would say that half the Pacific Coast hops are sold by that designation, but I could not speak concerning the usual habits of the trade in this regard.

Recross-examination.

(By Mr. BEST, of Counsel for Plaintiff.)

It is not the custom of my firm to cease our endeavors to sell hops when the market is most active, but in 1912 there were matters of importance in California that had to be attended to and we sacrificed some sales by having Mr. Eckstein go out there. I know of my own knowledge that the 118 bales that were sold by my firm for 18 cents a pound were not choice hops. I know this from the time of the purchase and the sample number that is referred to at the time. There is nothing on the list that indicates the sample number or the time of the purchase and I know to whom they were sold, but I do not think it necessary to state. I was instructed by the firm not to divulge that information. When we sold Pacific Coast hops we can deliver Oregon or Sacramento. I do not remember having delivered any Cosumnes on the Pacific Coast designation at that time. I have no recollection and no record of selling Cosumnes hops in November, 1912.

(Deposition of Mark J. Murphy.)

Same witness recalled on the following day, testified further as follows:

Since the adjournment yesterday I have not been able to determine the relative quotation of Washington and Oregon hops [206] and of California hops that were sold by my firm in November, 1912.

Deposition of G. G. Schumacher, for Defendant.

G. G. SCHUMACHER, called as a witness for defendant, sworn, testified as follows: [207]

Direct Examination.

(By Mr. POWERS.)

My name is G. G. Schumacher. I am secretary and treasurer of A. Magnus & Sons Company, who engage in the general brewers supplies business, hops, rice, machinery and supplies. The office is in Chicago, but cover the whole United States, Mexico, and part of Canada. I have been in business and connected with that concern for 35 years and have bought and sold hops during that period and am familiar with the market in Chicago and vicinity, including Milwaukee which is 85 miles from Chicago. My firm has been accustomed to buy and sell hops in the open market in competition and I have had charge of such transactions for [208] several years. I am familiar with the prices of hops in Chicago, Milwaukee and vicinity and have been for the last ten years. I have been in touch with that market daily in that territory, with the exception perhaps of a few weeks when I have been away on a vacation. There is no difference in the market price of hops in

(Deposition of G. G. Schumacher.)

Chicago and Milwaukee. I was familiar with the price of Cosumnes hops in the market of Milwaukee and vicinity commencing with November 4, 1912, and thereafter for the next few weeks. The market price of strictly choice Cosumnes hops in that market at that time was about twenty-three cents and for choice hops twenty-two cents. There was a fairly active market at that time. Ordinarily we ought to be able to sell two thousand bales of choice hops in Chicago and vicinity in a month's time. A paper here called the "Daily Brewers' Bulletin" keeps records of the state of the market and the quotations in that paper are fairly accurate. I have been familiar with these quotations for seven or eight years prior to November 4, 1912. I have furnished information to that paper almost daily and I subsequently check over the records made by the paper as to the information given them by me by means of reading the bulletin. They not only publish the information we gave them but the information they get from others. The information as I gave it to them came out accurate as to the prices quoted and the trade usually accepted the figures as given them by this paper as being accurate.

Cross-examination.

(By Mr. LEWIS.)

We do not sell hops to the Pabst Brewing Company. I think we did a good many years ago. I am familiar with the Cosumnes hops as distinguished from the other types of Pacific Coast hops. I based the price of choice Cosumnes hops on the price of choice Oregon and choice Sonomas. We always

(Deposition of G. G. Schumacher.)

figure that the Cosumnes are worth about a cent less than those qualities. [209] Cosumnes hops were close to the price of Oregon and Sonomas in 1912, but I should think they were, and would say so, but I have no definite recollection on that point. I do not know of any trade paper of any kind that quoted Cosumnes hops in November, 1912. I think that was due to the fact that Consumnes hops were not as a rule well known to the brewers at that time; and very few of them were actually sold to brewers in this territory. I have no idea how many Cosumnes hops were sold to brewers in Chicago or vicinity in 1912. My firm did not sell any during November, 1912. The Pacific Coast hops during that month were selling from twenty-two and a half cents to twenty-four cents. I am testifying both on the basis of my own sales and the reports of the "Brewers' Daily Bulletin." The highest price that I secured for any Pacific Coast hops during that time was 24½ cents; the lowest price of choice hops during that month was 22½ cents. Those were not Sacramento Valley hops. We did not sell any Sacramento Valley hops, or any Consumnes hops, during that period of time. The price of 22 cents for Cosumnes hops in November, 1912, would be the prime to choice, as we call it. When they are strictly choice the price would be twenty-three cents. As far as our company is concerned we have two grades choice and medium to prime. We have men out all over the country traveling all the time and I could not say in what particular section we could sell two thousand bales of

(Deposition of G. G. Schumacher.)

hops, but I should think that we ought to be able to sell that many bales. I do not know whether we sold two thousand bales during November, 1912, or not. Offhand we should sell from 8 to 10 thousand bales a year. The hop season is short; it generally opens up in October, and about February or March it is about over with. I have not refreshed my memory with reference to the amount of sales during the month of November, 1912. [210]

Q. Do you know approximately how many bales of hops were consumed in 1912, or the crop season of 1912–1913, in Milwaukee?

A. No, I do not; I haven't any idea.

Q. Do you know of any firm or any number of firms that took a quantity of hops, Cosumnes hops, choice Cosumnes hops, could have been sold to Milwaukee, at the period that is under consideration?

A. No.

Mr. LEWIS.—Is it your opinion that 2,000 bales, either together or in small portions thereof, could have been sold to any firm or any number of firms in the City of Chicago during that time?

A. At a price, yes.

Q. They could not have been sold at the price which you have mentioned, could they?

A. Not that quantity, I do not think.

Q. What shading of price do you think would have been necessary to have accomplished such a sale?

Mr. SPOONER.—Or sales?

(Deposition of G. G. Schumacher.)

A. Oh, probably 2 cents a pound. I am simply giving this as an estimate.

Q. Now, suppose we add the further fact that this particular lot of 2,000 bales of Cosumnes hops had been rejected by the Pabst Brewing Company; and assuming that that fact were known in the trade, I will ask you that you think could have been secured for those hops in this market, in the market which you have mentioned, within a reasonable time after the 4th of November, 1912, assuming, however, that the quality actually was choice.

A. That I could not say.

Mr. LEWIS.—Q. Those facts would, however, affect the price considerably, would they not?

A. They would. [211]

Mr. LEWIS.—Q. In answering the question in the affirmative, Mr. Schumacher, what would you mean in following the word "considerably" which I used? How much, approximately, do you think that would have affected the price?

A. Well, that would depend entirely on the samples.

Mr. SPOONER.—Assume it choice.

A. You might call it a choice, and I might call it a prime. That is a matter of opinion.

Mr. LEWIS.—Q. And that is a matter very largely of individual opinion, is it not?

A. Yes, sir.

Q. And the fact that the Pabst Brewing Company had rejected choice hops would tend to affect considerably the opinion of the purchaser as to whether

(Deposition of G. G. Schumacher.)

the samples were choice, would it not?

A. If the buyer knew of the fact, it would.

Mr. LEWIS.—Q. That is what I mean. Assuming that the buyer knew that these had been rejected?

A. Yes, sir.

Q. That would affect it? A. Yes, sir.

Mr. SPOONER.—Q. With respect to the question that was asked relating to the sale of a given quantity of bales which had been rejected you stated, I believe, at that time or another time, in answer to one of the questions put by Mr. Lewis, that the question of the purchase of hops by sample was a question of opinion. Now, I ask you, with that preliminary statement, to direct your mind to the particular part that I have in mind; I will ask you whether or not in your opinion the matter of given samples having been rejected by the Pabst Brewing Company would make much, if any difference if the hops were in fact choice, to a man who wished to purchase choice hops.

A. No, I do not think it would make much difference, if the hops were choice goods, and as I said before, they would probably have to accept a reduction, in order to make the sale. [212] With reference to the reports in the "Brewers' Daily Bulletin" during November, 1912, I think they were a fair representation of the market prices selling to people who want the hops for immediate use. If a man had been offered two thousand bales of choice Cosumnes hops at that time who was not in the immediate need of such hops for his own purpose, he would expect to get them for less money; how much less would depend

(Deposition of G. G. Schumacher.)

on market conditions at the time. At that time the price was stationary up to toward the end of the month, when it advanced probably a cent a pound, and probably during the month of November, 1912, it declined. I make reports to the "Brewers' Daily Bulletin" not only of sales but of general trade conditions and I found the reports correct in both respects.

Redirect Examination.

(By Mr. POWERS.)

Sonomas usually bring a cent a pound to a cent and a half a pound more than Cosumnes, but I do not remember that particular year.

Mr. POWERS.—I am showing you a copy of the "Brewers' Bulletin for November 7, 1912, in which it says the California markets are firm, though quiet. Sonomas that previously were offering at 18½ cents are now being held at 20¢ net to the growers. Do you remember whether that was a correct statement of the situation on November 7, 1912, or not?

A. I presume it was. The difference between prices to growers and dealers in carload lots in November, 1912, is two cents a pound and if the freight was one half cent a pound there ought to be 3½ cents added to the price to the grower in order to get the price to the brewer in Milwaukee. Sonoma and Mendocino are always in more demand than Cosumnes, or Butte County, or the cheaper grades. That applies also with reference to choice hops. A man who wants Sonoma hops will not ordinarily accept Cosumnes hops; consequently they are not changeable merely at a difference in price. The

(Deposition of G. G. Schumacher.)

Sonoma hops represent [212½] what in the brewing trade is known as the highest quality of California. They are nearer the Oregon type and quite distinguishable from the Sacramento type. The Cosumnes are one of the Sacramento type.

A Chicago salesman goes anywhere to sell hops and if he had two thousand bales of hops in Chicago to sell in a month he would sell anywhere in the United States. The freight is always the same, whether you ship to New Orleans, or any other place. With respect to the effect upon a sale of a particular lot, after the rejection of that lot by the Pabst Brewing Company, in my opinion, I do not think it would make much difference if the hops were choice goods, but, as I said before, they would probably have to accept a reduction if they wanted to sell two thousand bales in one month.

Recross-examination.

(By Mr. LEWIS.)

The market on the Pacific Coast hops is really the Pacific Coast and everywhere else it is figured on the basis of the market price there plus freight to the place of consumption. [213]

Deposition of Rudolph Keitel, for Defendant.

RUDOLPH KEITEL, called on behalf of defendant, sworn, testified as follows:

Direct examination.

(By Mr. POWERS.)

My name is Rudolph Keitel. I am the editor and

(Deposition of Rudolph Keitel.)

publisher of the "Brewers' Bulletin" at 327 South La Salle Street, Chicago. We get the information concerning hops that appears in the bulletin from brewers who are the consumers of hops, and the dealers in hops. It was the same in 1912 as it is now. It commenced on the second day of January, 1908 and has been published in the same manner ever since. It was a daily paper up to April, 1914, and on April, 1914 became a tri-weekly, and it is to-day. During 1912 it was daily. The statements made in my paper concerning hops in 1912 were obtained from reports as stated. I was the editor at that time. Information published in the paper during 1912 was compiled by me. I wrote the reports. I had men employed who helped to get me that information. My circulation covers the brewers and the allied trades in the United States, from Coast to Coast. The statements contained in my paper are accepted by the trade as facts. The statements contained in the paper regarding prices of hops and the condition of the market in hops, as gained by me were on the same day in most instances, in other instances the day before. The statements contained in my paper were truthful statements according to our best knowledge, information and belief. Because what good would they be in a market paper, if they were not of that kind? Referring to a paper marked "Brewers' Daily Bulletin," dated November 4, 1912, I find the item Russian Rivers, strictly choice, 22 "a" in a circle "23 c"—cents, that means that the range of prices on the day was 22 to 23 cents per

(Deposition of Rudolph Keitel.)

pound delivered to brewers for Russian River hops, and the same day Sonomas strictly choice 23 @ 24¢ means Sonoma hops strictly choice were sold to the brewers at 23 to 24 cents per pound. There are certain other quotations referring to the price. [214]

Mr. Powers then introduced in evidence the portion of the "Brewers' Bulletin" published November 4, 1912, referring to the price of Pacific Coast hops which read as follows: [215]

EXTRACT FROM "BREWERS' DAILY BULLETIN," NOV. 4, 1912.

HOPS.

The total of the hop crops in the United States is said to be much larger than previously estimated. Definite figures cannot be had as yet but best statiticians declare that Oregon produced 125,000 bales, California 110,000 bales, Washington 37,000 bales, New York State 25,000 bales, which means a grand total of 297,000 bales. [216]

While a large part of the coast crop is inferior in quality owing to the unfavorable weather during the harvest season, the enormous bulk of the crop has been a factor in creating a bearish sentiment as regards prices. The markets everywhere are reported as being rather quiet at present. Quotations to brewers are as follows:

1912 Pacific Coast hops—

Oregons, strictly choice, free of mould.....23@24c
Yakimas, strictly choice .....24@25c
Mendocinos, strictly choice .....22@23c
Russian Rivers, strictly choice .....22@23c

(Deposition of Rudolph Keitel.)

Sonomas, strictly choice .....23@24c
Pacifics, medium to prime .....20@21c
Pacifics, lower grade, poor quality, mouldy..18@19c

[217]

WITNESS.—This paper shows that the market to brewers on November 7, 1912, for strictly choice Sonomas was from twenty-three to twenty-four cents per pound and the Pacific Coast hops of every character, Oregons or Californias, or Washingtons' of a medium to prime character were sold to the brewers at 20 to 21 cents per pound and the Pacific Coast of a lower grade, poorer quality and mouldy were selling to brewers on that date at 18 to 19 cents per pound. We got the information from the trade at large; from both the dealers and the brewers. We never at any time during the month of November, 1912, had any person connected with the trade inform us that any figures given by us were incorrect. That, of course, was a long time back. Five years ago. Not to my knowledge did I have any complaint as to the figures given by my paper and I do not believe there ever has been. The figures under the words "1912 Pacific Coast hops" as appear in the "Brewers' Daily Bulletin" published November 12, 1912, are correct. Mr. Powers then introduced the figures contained in said paper on hops, reading as follows:

[218]

EXTRACT FROM "BREWERS' DAILY BULLETIN," NOVEMBER 7, 1912.

HOPS.

A somewhat quieter tone is displayed in the hop

markets on the Pacific Coast and trading is slow for the moment. Advices from Oregon are to the effect that strictly choice hops are becoming very scarce and that prime goods are gradually forcing up the grading and price of inferior growths. It is stated that hops that could not command 10c a month ago are now being held at 15c net to growers. The California markets are firm, though quiet. Sonomas that previously were offering at 18½c are now being held at 20c net to growers.

Hop trade with brewers continues quiet, the demand being of a desultory character. Quotations are generally steady and as follows:

1912 Pacific Coast hops—

Oregons, strictly choice, free of mould.....23@24c
Yakimas, strictly choice .....24@25c
Mendocinos, strictly choice .....22@23c
Russian Rivers, strictly choice.....22@23c
Sonomas, strictly choice .....23@24c
Pacifics, medium to prime .....20@21c
Pacifics, lower grade, poor quality, mouldy..18@19c

[219]

EXTRACT FROM "BREWERS' DAILY BULLETIN," NOVEMBER 12, 1912.

HOPS.

In the absence of active business at the primary districts on the Pacific Coast and in New York state, the hop markets everywhere are more or less at a standstill for the time. The price situation shows no change as a rule, choice goods being held firm and inferior growths neglected and showing signs of

weakness. The markets on the cost stand firm for choice at 20c to 21c, and easy for common to medium at 12c to 19c net to growers according to quality. Those are the asked prices, no business being reported, except in a small way.

A general lack of interest is noted among the brewers.

Quotations are as follows:

1912 Pacific Coast hops—

Oregons, strictly choice .....24@25c
Yakimas, strictly choice .....24@25c
Mendocinos, strictly choice .....24@25c
Mendocinos, strrictly choice.....24@25c
Russian Rivers, strictly choice.....24@25c
Sonomas, strictly choice .....24@25c
Pacifics, medium to prime .....20@21c
Pacifics, lower grade, poor quality, mouldy..18@19c

[220]

The items contained in my paper under date of November 14, 1912, commenced 1912, Pacific Coast hops with figures below it with reference to various kinds of Pacific Coast hops are correct. The statements therein contained are true.

Mr. Powers then introduced the statements contained in said paper reading as follows: [221]

EXTRACT FROM "BREWERS' DAILY BULLETIN," NOVEMBER 14, 1912.

HOPS.

Advices from the Pacific Coast state that hop trade for the past week has been on a very quiet scale, business being held up by the holding-off disposition of

(Deposition of Rudolph Keitel.)

the buyers, who are trying to force the market to a lower level. A little trade is reported in California at 13c to 19c net to growers, according to quality; and in Oregon a little trade between dealers at 18c and 19c for what is now considered choice quality. Common Oregons are offered freely at 13c to 15c, and they are not getting much attention from the buyers. Growers are anxious to sell their poorer growths, and generally are willing to accept lower prices.

Hop trade with brewers is quiet and without special feature. Choice is held firm, while mediums are a shade lower.

Quotations:

1912 Pacific Coast hops—

Oregons, strictly choice .....24@25c
Yakimas, strictly choice .....24@25c
Mendocinos, strictly choice.....24@25c
Russian Rivers, strictly choice.....24@25c
Sonomas, strictly choice .....24@25c
Pacifics medium to prime.....19@22c
Pacifics, lower grade, poor quality, mouldy..18@19c
1911 Pacifics .....18@20c

[222]

The witness then testified that the statements contained in the issue of his paper under date of November 18, 1912, and of November 23, 1912, and of November 27, 1912, with reference to prices of hops headed "1912 Pacific Coast hops" as set forth in articles under the word "Hops" were correct statements of the market as it was at these respective dates. Mr. Powers then introduced the portions of

said paper with reference to the price of hops headed "1912 Pacific Coast hops" as follows: [223]

EXTRACT FROM "BREWERS' DAILY BULLETIN," NOVEMBER 18, 1912.

HOPS.

There is very little doing in the hop market at present. Conditions on the coast remain about the same as previously reported. Growers are asking full prices for choice goods, and for such 20¢ in the running price. Future trade on the coast will be largely of a selective character in the medium to prime grades and the closer discrimination has had the effect of weakening the market. Some very nice lots recently have been sold at 17¢ and 18¢, and lower grades ranged down from 16¢ to 12¢ net to growers. * * *

Hop trade with brewers is limited. Deliveries on earlier contracts are being made right along, but there is not much fresh business. Quotations to brewers are as follows:

1912 Pacific Coast hops—

Oregons, choice .....23@24c
Yakimas, choice .....23@24c
Mendocinos, choice .....23@24c
Russian Rivers, choice.....23@24c
Sonomas, choice .....23@24c
Pacifics, medium to prime .....18@21c
Pacific, medium to prime.....19@22c
Pacifics, lower grade, poor quality, mouldy..15@17c
[224]

EXTRACT FROM "BREWERS' DAILY BULLETIN," NOVEMBER 23, 1912.

HOPS.

At the rate hops have been moving of late, the chances are that a very large portion of the crops will have passed out of growers' hands by the end of the year. This is the gist of advices from the Pacific Coast. Until a couple of weeks ago, the buyers were not inclined to pay much attention to the medium and inferior grades, the demand being almost wholly for the best. Of the latter, holdings are now very scarce, and buyers naturally turned to the lower grades, which the growers were disposed to let go on a liberal scale. Fifteen to 17 cents have been the going prices paid for the best of the medium stock, with inferior quality ranging down to 10c. In a general way 18c net to growers now is regarded as the top quotation for the best selections of the medium grades. The few remaining lots of really choice quality are held firm at 20½c to 21c to growers. The markets have been quiet in the past few days, and with brewers well supplied, and with growers having made large sales, both buyers and sellers are in an equally independent position for the time.

Quotations to brewers are as follows:

1912 Pacific Coast hops—

Oregons, choice .....23½@25c
Yakimas, choice .....23½@25c
Mendocinos, choice .....23½@25c
Russian Rivers, choice.....23½@25c
Sonomas, choice .....23½@25c

Pacifics, medium to prime.....18@21c
Pacifics, medium to prime .....19@22c
Pacifics, lower grade, poor quality, mouldy..15@17c
1911 Pacifics .....18@20c
[225]

EXTRACT FROM "BREWERS' DAILY BULLETIN," NOVEMBER 27, 1912.

HOPS.

Advices indicate that there are still some strictly choice hops left in Oregon and Yakima, but they are scarce and held at 20c and 21c net to growers. Similar reports are received from California. Prime stock is quoted at 17c to 18c and common to fair at 10c to 16c net to growers. There is an easier tendency in the inferior grades, growers as a rule being disposed to consider the bids of buyers.

There is a moderate demand from brewers for the best grades.

Quotations are as follows:

1912 Pacific Coast hops—

Oregons, choice .....23½@25c
Yakimas, choice .....23½@25c
Mendocinos, choice .....23½@25c
Russian Rivers, choice.....23½@25c
Sonomas, choice .....23½@25c
Pacifics, medium to prime.....18 @21c
Pacifics, lower grade, poor quality, mouldy.15 @17c
1911 Pacifics .....18 @20c
[226]

WITNESS.—The prices therein contained as to

(Deposition of Rudolph Keitel.)

prices of hops are correct prices of hops on the respective dates.

Cross-examination.

(By Mr. LEWIS.)

I wrote the explanatory portions of the articles under the caption of "Hops" as they appeared in my paper according to my best knowledge. I wrote every one of them. I have not read a single one of them, I dare say, since they were published. I have no personal recollection at the present time what was the condition of the hop market of November, 1912. There are no quotations of Cosumnes hops in my paper. I cannot say why this is so. It is possible that the dealers and the brewers from whom I got my information, did not buy any of them, or for some reason of that kind. I could not say whether or not any transactions were had in them. I have no means of saying whether the various prices given in these issues of the paper which have been introduced here, were based upon actual transactions or simply upon prices that were being asked. We have no record of any actual transactions and sales are not made every day. I did not myself participate in any of the sales that were made and was not present when any sales were made or any price agreed upon in November, 1912. The information was gathered by me in part and the other part was gathered by my office staff. I absolutely relied on the men and if they had any brain storms I would find it out mighty quick and would not stand for it. My men, including myself, secured from the various sources of information such

(Deposition of Rudolph Keitel.)

information as they thought was reliable, and it was the basis of that that these figures and these articles were compiled; but so far as the transactions themselves were concerned I did not actually see them or participate in them. When we go around to these hop men to get information they show us telegrams and letters from the Pacific Coast and from that stuff [227] we compile the gossipy part of the hop market report just as carefully and just as accurately as the remainder of it. Telegrams, letters and everything else; all the information we can get, and also gossip, I suppose, to some extent because that *if* how market reports are obtained. With reference to facts stated in the papers, if it happened last week I could explain that, probably, but I cannot tell five years back. If you ask me now, to-day, whether they were buying, how the market stands, I could give you a fair idea, but I cannot tell that five years back. The reports as to prices were accurate then in the same way as they are accurate to-day, according to the best information I can obtain. If the reports say there was an active demand or an inactive demand, then that was the condition at the time referred to in the report. The statement contained in the issue of November 12, 1912, to the effect that there was a general lack of interest among the brewers, was accurate on that day, and the statement in the issue of November 18, 1912, that deliveries on earlier contracts are being made right along, but there is not much fresh business, is also correct, and the statement in the issue of November ——, 1912 that the markets had been quiet in the

(Deposition of Rudolph Keitel.)

last few days and with brewers well supplied and with growers having made large sales, both buyers and sellers are in equally independent position for the time, no doubt that was accurate.

Mr. Lewis then showed witness a copy of the Brewers' Bulletin of November 8, 1912, and also of November 16, 1912, and the witness testified that he was editor of the paper at the times mentioned and the statements contained in these two issues for the quotations of hops were correct and obtained in the same way as the statements contained in the other issues and he then offered the prices under the caption of "Hops" of these two issues in evidence. The same were as follows: [227½]

EXTRACT FROM "BREWERS' DAILY BULLETIN," NOVEMBER 8, 1912.

HOPS.

No new developments are noted in the hop markets on the Pacific Coast. Business is reported as being more quiet than recently and buyers do not seem anxious to take on fresh stocks. Holders of choice growths are firm in their views, but there is more disposition to sell.

Brewers having made large purchases early in the season, are taking no interest in the market for the moment and the general demand is slow. Quotations are unchanged as a rule, and as follows:

1912 Pacific Coast hops

Oregons, strictly choice.....23@24c
Yakimas, strictly choice.....24@25c
Mendocinos, strictly choice.....22@23c

Russian Rivers, strictly choice.....22@23c
Sonomas, strictly choice.....23@24c
Pacifics, medium to prime.....20@21c
Pacifics, lower grade, poor quality, mouldy..18@19c
[228]

EXTRACT FROM "BREWERS' DAILY BULLETIN," NOVEMBER 16, 1912.

HOPS.

The week closes with the hop market quiet and without new feature. Of the Oregon and Washington crops the greatest part of the best grades has passed out of growers' hands, and the scattered fragments that remain unsold as a rule are firmly held for better prices than dealers are willing to pay. The interest in medium and inferior grades is not keen, but growers believe that with the best stocks out of the way, there will sooner or later be a demand for the most desirable lots that are available. For the best hops now obtainable on the coast 18c to 29c is the going quotation net to growers. On the lower grades quotations run from 12c to 16c, and these from this time on will figure largely in the future trading. * * *

Brewers being well covered by contracts made earlier in the season, are not taking an active interest in the situation, and are now taking deliveries on their purchases. Quotations are as follows:

Oregons, choice .....23@24c
Yakimas, choice .....23@24c
Mendocinos, choice .....23@24c
Russian Rivers, choice.....23@24c

(Deposition of Rudolph Keitel.)

Sonomas, choice.....23@24c
Pacifics, medium to prime.....18@21c
Pacifics, medium to prime.....19@22c
Pacifics, lower grade, poor quality, mouldy..15@17c
[229]

I was not familiar with the quantities of hops consumed either in Milwaukee or in Chicago in 1912 or during the crop year, 1912–13. I am not attempting to testify here as an expert myself as to hop value or hop prices. [229½]

Redirect Examination.

(By Mr. POWERS.)

Referring to the article "Hops" in the issue of November 8, 1912, I see that the Russian River hops, strictly choice, were selling to the brewers on that day at 22 to 23 cents and that Sonomas hops of strictly choice character were selling at the same day from 23 to 24 cents and the Pacific Coast lower grade, poor quality, mouldy which were then medium to prime, and were selling at 18 to 19 cents to the grower at that time. No person, during the month of November, 1912, complained to me that the prices set froth in the papers were not the correct prices current at that time. I have not been in the habit of having complaints. If there had been any objections made. Of course it is a long time ago but I have no memory of any objections. On the issue of my paper on the 8th appeared the words "Holders of choice growths are firm in their views, but there is more disposition to sell." That was the truth that indicated that the holders of choice hops had been holding on to them

(Deposition of Rudolph Keitel.)

strongly and had just been commencing to let loose of them on November 8th. Under my issue of November 16th, 1912, the words are contained "The interest in medium and inferior grades is not keen but growers believe that with the best stocks out of the way there will sooner or later be a demand for the most desirable lots that are available."

That means that medium and inferior hops had not been selling so freely. The papers which have been introduced in evidence are regular issues in the regular course of our business and distributed amongst the trade including brewers and other persons interested in hops in Chicago and vicinity and the respective dates which are on the papers.

Recross-examination.

(By Mr. BEST.)

The statements with reference to the contents of the papers [230] introduced by plaintiff were correct and obtained in the same manner as has been testified concerning the other issues.

Redirect Examination.

(By Mr. POWERS.)

The prices we set forth in our paper were the prices a man reasonably desirous of buying would pay to a man reasonably desirous of selling. In the articles under the title "Hops" there is a part that refers to the prices and part that refers to the comment of the trade, but it reflects accurate conditions just the same. I am referring to the reading matter, not the quotations. I have been familiar with the prices paid for the hops which were sold continuously

(Deposition of Rudolph Keitel.)

for many years. So continuous and so accurate has been my knowledge of the work that I knew the values of hops of the character described without knowing the quality of the hops. During the last ten years I have been constantly in touch with the trade in respect to the prices paid and accepted for Pacific Coast hops, and also in all other kinds of hops specified in the articles but whether or not I thereby became familiar with the prices actually being paid and actually being received during the month of November, 1912, is a question rather hard to answer.

Q. Are you familiar—did you thereby become familiar with the prices actually being paid and actually being received during the month of November, 1912, for instance?

A. Well, that is a question that is rather hard to answer, because there are certain days when there are no actual sales. Do you see what I mean? Other days there are sales. So consequently how shall I answer. I do not quite know how to answer the question accurately.

Q. But you knew about—

A. There are many transactions which I naturally knew about.

Q. Were those transactions used in your paper, or not?

A. They were reflected in the quotations, naturally.

[231]

Recross-examination.

(By Mr. LEWIS.)

The source of the information for the gossip part

and the quotations part was not identically the same. If I ask a brewer, for instance, whether he bought hops to-day or yesterday and ask him the price he paid, he will tell me so much, 18 or 19 or 21 cents. On the other hand, when I see a hop dealer and ask him how much he sold hops for, he will give me the price. There are some days on which I cannot hear of any deals at all; I then ask the dealer what is he asking for choice Cosumnes hops or anything like that. He will give me his quotations.

Q. Then, did not you get the gossipy part of the article from the s*ale* same people?

A. Yes, sir; I did, of course. If I come and ask you what you name for hops, you name me a specific price, 18 or 19¢, or whatever you may ask. If I ask a dealer how about the market conditions, how are the growers selling on the coast, or the like, he will probably take out his letters and telegrams and give me the information. The information is correct, but is not a direct quotation. The information was gotten from the same sources, and was just as correct as the other, and I reported the one just as correctly as I did the other, and I had just as much reason to believe the one as the other. I do not mean to say at all that there were always sales every day at the prices that were given; so when I answered Mr. Powers' questions on this subject, I meant to say they were the market prices that day, and I have no way of telling whether they were selling that day or whether they were the prices that the various dealers and brewers were giving me. I know

(Deposition of Rudolph Keitel.)

I have been present at times when the transactions have taken place. I have seen contracts signed. I have seen telegrams of confirmation, but I cannot say whether they took place on any one of these particular days, that is too long ago, but I mean that in my course of business I see [232] these things. I was not able to tell the difference between the choice Cosumnes hops in November, 1912. I cannot say that I know enough of the trade of November, 1912, to say what were the real market prices and what were the conditions that affected the market prices at that time. I cannot answer what was the quantity, of Pacific Coast hops that was used in Milwaukee in the year 1912, or in the crop year 1912–1913, nor who was in the market for choice Cosumnes hops in November, 1912; that is impossible for me to answer. I cannot say either what was the consumption of Pacific Coast hops in Chicago in the year 1912, or during the crop year of 1912–1913; and I cannot recall anybody that was in the market for any choice Cosumnes hops in Chicago, or anywhere in the vicinity, in 1912. I cannot say that I really know anybody who would buy Cosumnes hops at any time, or what consumers used Cosumnes hops in November, 1912. I cannot say that I knew anybody that was using Cosumnes hops.

Redirect.

(Mr. POWERS.)

Where the price is from 23 to 24 cents, for instance, upon Sonomas, and that runs along for several days I might continue to carry it until a change takes place. If there was no demand for several days, or

(Deposition of Rudolph Keitel.)

a brewer comes along and says, "I will buy for a cent less," or if the market begins to change because of some sale, or because of the lowering in the asking price, or something like that, then I change my quotations in my paper and in that way the data published in the "Brewers' Bulletin" was based upon the information obtained from transactions, although there may have been no sale on that particular day.

Mr. BEST.—The articles which accompany the figures I give in my publication honestly and fairly reflect the condition of the hop market on the date of the issue in which they appear and I term gossip as distinctive from the actual figures which I place there is a [233] correct and actual reflection of the conditions in the hop market in that particular time. The circulation of my paper has increased all the time. [234]

Testimony of P. C. Drescher, for Defendant.

P. C. DRESCHER, called for defendant, sworn, testified as follows:

I am a merchant in the wholesale grocery line, including hops. Have been engaged in the hop business for some forty-odd years, in the capacity of buying and selling almost everything connected with the business, with headquarters at Sacramento, and am familiar with Cosumnes hops ever since they were grown on the Cosumnes River.

Q. Were you familiar with the market in Milwaukee in November, 1912, for choice Consumnes hops? A. The market at Milwaukee?

(Testimony of P. C. Drescher.)

Q. Yes.

A. I could not say that I was at Milwaukee.

Q. Do you keep track of the market throughout the various cities of the United States?

A. To an extent; yes.

Q. The market in Milwaukee was the same as at Sacramento, plus the freight, was it not?

A. The markets of the country are relative; the difference of the freight and transportation is practically the difference between the market prices.

The COURT.—Q. At different points? A. Yes.

Mr. POWERS.—Q. The market being affected in that way, are you able to state the market value of choice Consumnes hops in Milwaukee on November 4, 1912, or thereabouts?

A. Putting it on that basis, and adding the freight that was then in effect between this point and Milwaukee, I would say that I would be. The markets in the country are relative; the difference of the freight and transportation is practically the difference between the market prices, at different points.

Mr. POWERS.—Q. The market being affected in that way, are you able to state the market value of choice Consumnes hops in Milwaukee on November 4, 1912, or thereabouts?

A. Putting it on that basis, and adding the freight that was then in effect between this point [235] and Milwaukee, I would say that I would be.

Q. What was the market value of choice Consumnes hops in Milwaukee on November 4, 1912, or thereabouts? A. I would say about 20 cents.

(Testimony of P. C. Drescher.)

Cross-examination.

(By Mr. DEVLIN.)

The difference between the market price of choice Consumnes and prime Consumnes hops in Milwaukee in November, 1912, would vary according to the way the market is furnished either with choice, or according to the demand that there may be for either one or the other. As I remember it, in 1912 the market for choice Consumnes hops was very strong. To the best of my recollection and judgment at that time the difference between choice and prime hops was 1½¢ per pound. The difference between prime and medium; that is even harder to answer, because medium, ordinarily, is very much neglected, and the difference between those two I would not want to make a guess at at that time. Medium is lower than prime and common is lower than medium. I would not be able to say whether most of the brewers had made their purchases. That is a very difficult matter to determine. There was a demand on the market for the best class of hops.

Q. Do you know of any sales to brewers at all in November and December, 1912?

A. I could not say that I do know of any sales to brewers at that time.

Q. Do you know of sales between dealer and dealer? A. I do.

Q. Were they on samples?

A. As far as my knowledge goes, they were on samples.

Q. Do you know, of your own knowledge, of any

(Testimony of P. C. Drescher.)

sales made in November or December, 1912, that were not made to match samples? Answer that "Yes," or "No." A. I do not know of any.

Q. Now, do you know whether sales made in November and December, 1912, where hops were bought from farmers, were made on special sales, to match special orders?

A. I do not. I do not know for [236] what purpose people were buying hops. Most likely they bought in some cases to fill orders.

Q. Would it be more difficult to sell 2,000 bales of hops in November, 1912, than 200 bales? A. It would be as easy; sometimes even easier. In November and December, 1912, it would not have taken long to sell 2,000 bales of hops if they were choice. It would have been more difficult to have sold prime and medium hops than to have sold choice hops.

Q. How was the market in November, 1912? A. Hops would sell as readily as they would have bought later on in a less willing market. In November and December, the market was firm for choice hops and not as firm for prime. I know a good many hops that have been contracted for and sold prior to November, 1912.

Q. Isn't the larger portion of the hops in any one year either sold or contracted to be sold before November of that year?

A. I could not say that it is invariably the case; often it is the case.

Q. In 1912, how was it, do you know?

A. In 1912, my recollection is that a good many of

(Testimony of P. C. Drescher.)

the hops had been sold and contracted for prior to that time, because our harvest here is in August, and September, and a good many of the hops, therefore, had been sold on the market as well. I examined some hops at the last trial on certain samples, and my general recollection is that the hops thus submitted were not choice. The best hops generally bring the best prices. I did not hear of any choice Consumnes hops selling for 14½ cents or 15 cents.

Q. Did you ever hear of a sale being made by Mr. Horst of choice Consumnes hops on November 12th, to the Steil Brewing Company at 14½ cents Eastern delivery? A. I did not.

Q. Or on the same date the Springfield Brewing Co. 98 bales of hops, 14 cents Eastern delivery?

A. I did not.

Q. Or to the Hoffer Brewing Company, at 15 cents, Eastern delivery? [237] A. I did not.

Q. In other words, you made no examination of that subject at all—you made no examination about these sales?

A. Never heard of them, and made no examination of Mr. Horst's sales.

Q. Never heard anything about them?

A. No, it did not interest me.

Q. It did not interest you at all? A. No.

Q. Now, Mr. Drescher, you are not very friendly with Mr. Horst, are you?

A. Well, I have no knowledge of being otherwise.

Q. You mean to say that you are friendly with him? A. We are not unfriendly, that I know of.

(Testimony of P. C. Drescher.)

Q. You are friendly?

A. I say we are not unfriendly. We see each other very seldom.

Q. You have had lawsuits with him?

A. Some twenty-odd years ago I had a legal contention with Mr. Horst, yes.

We have done business with the Pabst Brewing Company ever since 1880 and are still doing business with them. I cannot examine these samples at present shown me and tell anything about them. I was in a better position to judge them at the time of the last trial, but I would not undertake to pass on any of them to-day.

Q. After the former trial of this case, did the Pabst Brewing Company give you an order for 500 bales of hops?

A. I do not think so, but, as I said, we have had business with them every year, and it has been nothing unusual to have an order from them for 500 bales, if they needed them.

Q. You are doing business with them yet?

A. We are doing business to-day.

Redirect Examination.

(By Mr. POWERS.)

I know of sales about that time. In October and about that time and in November certain Wheatlands were sold. Choice Consumnes [238] ran somewhat better than choice Wheatlands. The choice Wheatlands were selling at that time at 19 cents f. o. b. Sacramento. I sold 210 bales, and in the month of December we sold choice Wheatlands at 17½ cents a

(Testimony of P. C. Drescher.)

pound; 200 bales. The market in October was quite firm; if anything a shade firmer, although in November there was very little difference, but I think the market was firmer. The prices were exactly the same. On October 28th, 500 bales of Wheatlands were sold here at 20 cents a pound. Hops in the Consumnes district ripen between the middle of August and the middle of September. There was a good inquiry for choice hops in November and December, 1912; for choice Consumnes hops in November, 1912. We had repeat offers for hops of that character.

Recross-examination.

(By Mr. DEVLIN.)

We raised Wheatlands. They were sold through brokers. November sales were on inquiries made at that time and the sale made at the time of delivery and they were not previously contracted for. The choice Cosumnes hops would rank somewhat better than, somewhat higher than Wheatlands. Choice Consumnes rate on about a par with choice Sonomas. You cannot say the highest range of hops on the Pacific Coast. They vary from year to year; weather conditions have an effect on them.

Q. Why do choice Sacramento hops range lower than choice Consumnes hops?

A. Because the quality of the choice Consumnes hops is better, it is more silky, the flavor generally is better, and it finds more favor with the trade.

The COURT.—Q. What is the determining feature that puts the hop of one district above another—that is, hops of the same relative [239] quality—what

(Testimony of P. C. Drescher.)

is the feature of the berry or the growth that makes it superior for commercial purposes?

A. The character of the lupulin, the flavor of the hop, which comes from the lupulin, and the silkiness is generally regarded as preferable to a hop harsh and drawn.

(Mr. DEVLIN.)

Q. One other question: You testified about 500 bales of hops being sold in October, didn't you?

A. Yes.

Q. Where were they billed, to whom?

A. They were sold to Strauss & Company, of London.

Q. That was an English sale?

A. Yes. I would not be able to say how many choice hops were produced in the Consumnes district in 1912. [240]

Testimony of E. Clemens Horst, for Plaintiff (In Rebuttal).

E. CLEMENS HORST, recalled in rebuttal. [241]

Q. You were here this afternoon when Mr. Zaumeyer was asked the question by the Court?

A. Yes.

Q. Were the four samples sent out by the Pabst Brewing Company to you on the table at that time?

A. Yes.

Mr. POWERS.—We object to that as immaterial, irrelevant and incompetent, and a breach of a stipulation that was entered into, which was binding be-

(Testimony of E. Clemens Horst.)

tween us, that there should be no testimony on the quality.

The COURT.—This was simply to test the witness' knowledge on cross-examination that I asked him the question; he had testified concerning his knowledge of hops, and I deemed it quite proper and still entertain the same idea exactly that he could have been permitted to exert his knowledge in passing upon the question of the identity of the samples tendered. It simply bears on his testimony, though. It does not affect the merits of the main considerations in the case.

Mr. DEVLIN.—He testified he knew the selling price of choice Consumnes hops. I asked him if he knew what choice Consumnes were, if he could pick them out, and if he knew what he was talking about, and that is admissible on that standpoint.

The COURT.—Q. You say the samples that were then sent, those four samples, were on the table?

A. Yes, they are still on the table.

Mr. POWERS.—This is all subject to the same objection and exception.

EXCEPTION #——.

Mr. DEVLIN.—Q. I will ask you, did you have a conversation with Gustav Pabst, the President of the defendant in this case, in [242] reference to this contract?

Mr. POWERS.—We object to that as irrelevant and immaterial, and not rebuttal.

The COURT.—That would depend upon the de-

(Testimony of E. Clemens Horst.)

position of Mr. Pabst, and I do not remember what was in that.

Mr. DEVLIN.—I tried to bring it out before in our case, and your Honor ruled I could not do it in our case.

The COURT.—It is admitted, I believe, that Mr. Pabst at that time was the president of the defendant corporation?

Mr. DEVLIN.—Yes.

Q. What was that conversation?

Mr. POWERS.—We object to that as irrelevant and immaterial.

The COURT.—What is this for?

Mr. DEVLIN.—It is for the purpose of showing that Mr. Pabst desired to sell the contract to Mr. Horst; he recognized the contract, and it also goes to the feature of good faith, showing whether he rejected these hops in good faith, or because he desired to get rid of what he thought was a losing contract.

The COURT.—I think that is rebuttal. Answer the question.

Mr. POWERS.—Exception.

EXCEPTION NO. 14.

A. I had a conversation with Mr. Pabst in Milwaukee in the end of 1911, and at that conversation Mr. Pabst wanted to sell me back the 2,000 bales' contract, and I wanted to buy it back, and we did not agree upon the price. My recollection now is we offered him a profit of $10,000 or $15,000, and he wanted $5,000 or $10,000 more than I offered him, and we did not get to a trade as to cancelling the contract.

(Testimony of E. Clemens Horst.)

Mr. POWERS.—Q. Who was present at that conversation?

A. I don't know who was present. My impression is his secretary. It was in his private office, at Milwaukee.

Q. Was anybody else present except you and him taking part in the conversation?

A. I don't recall, now, who was present. [243]

It is hereby stipulated that the foregoing Bill of Exceptions may be settled, certified, approved and allowed as defendant's Bill of Exceptions in the above-entitled matter.

Dated October 22, 1919.

DEVLIN & DEVLIN,
MAURICE E. HARRISON,
Attorneys for Plaintiff (Defendant in Error).
HELLER, POWERS & EHRMAN,
Attorneys for Defendant (Plaintiff in Error).

The foregoing bill of exceptions is hereby settled, certified and allowed.

Dated Oct. 25th, 1919.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Oct. 25, 1919. [244]

[Title of Court and Cause.]

Assignment of Errors.

Now comes the Pabst Brewing Company a corporation, defendant in the above-entitled action by Heller, Powers & Ehrman, its attorneys, and files the following as the errors upon which it will rely upon

its prosecution of the writ of error in the above-entitled cause.

ERRORS IN AND RELATING TO THE FINDINGS OF FACT.

The Court erred in its finding of fact III in finding that during the month of August, 1911, by virtue of said contract in writing made and entered into between plaintiff and defendant, plaintiff agreed to sell and deliver the defendant and defendant agreed to purchase, pay for and receive from plaintiff, two thousand (2,000) bales of choice air-dried Consumnes hops, to be grown in the State of California during the year 1912, delivery to be made after the curing of said crop of 1912, and on or prior to the 28th day of March, 1913, for the price of twenty cents per pound, f. o. b. cars at Milwaukee, Wisconsin, plus the freight, that is: freight from San Francisco, or California points to Milwaukee was to be paid by the defendant in addition to the purchase price named, for the reason that the evidence was insufficient to and there was no evidence to sustain the said finding. [247]

2. The Court erred in his finding of fact III in finding that the contract in question provided that the hops in question should be delivered on or prior to the 28th day of March, 1913, because there is no evidence to sustain the finding.

3. The Court erred in its finding in said finding III in finding therein that said "contract was in no other respect modified or changed by the subsequent correspondence or negotiations or other act of the parties" upon the ground that there is no evidence to

sustain the last-mentioned finding, and on the contrary the evidence shows that the plaintiff agreed with the defendant that it would sell and deliver to the defendant two thousand (2,000) bales of choice Consumnes hops equal to four samples of hops which the defendant had theretofore sent to plaintiff and would deliver to defendant samples of Consumnes hops on which they could make deliveries prior to forwarding the same for delivery.

4. The Court erred in finding in its finding of fact IV that the plaintiff was ready, able and willing to deliver the quantity specified by the contract of the defendant because there is no evidence to sustain such finding, because the evidence shows that plaintiff was not able to deliver the said quantity on November 4, 1912, or thereabouts, nor ready nor willing to do so.

5. The Court erred in its finding of fact IV that the plaintiff prior to submission of said samples procured a quantity of hops of the quality specified and called for in accordance with the terms of the contract, because there is no evidence to sustain said finding.

6. The Court erred in finding in its finding of fact IV that the plaintiff was at the time said samples were submitted ready, able and willing to deliver the quantity of hops of the quality specified and called for in accordance with the terms of [248] the contract, because there is no evidence to sustain said finding.

7. The Court erred in finding in its finding of fact IV that the plaintiff was down to November 4, 1912, ready, able and willing to deliver the quantity of hops

of the quality specified and called for in accordance with the terms of the contract, because there is no evidence to sustain said finding.

8. The Court erred in finding in its said finding of fact IV that the plaintiff was on November 4, 1912, ready, able and willing to deliver the quantity of hops of the quality specified and called for in accordance with the terms of the contract, because there is no evidence to sustain said finding.

9. The Court erred in finding in its said finding of fact IV that the samples submitted by the plaintiff to defendant represented hops of the character and quality called for by the contract, because there is no evidence to sustain the said finding.

10. The Court erred in finding in its said finding of fact IV that the plaintiff was able to deliver the quantity of hops specified by the contract to the defendant, because there is no evidence to sustain the finding.

11. The Court erred in finding in its said finding of fact IV that all of the samples submitted by plaintiff to defendant were rejected by defendant, because there is no evidence to show that samples originally referred to in the correspondence as samples 1 to 20 were ever tendered by plaintiff to defendant after the contract was completed or were ever rejected by defendant after tender on the contract.

12. The Court erred in finding in its said finding of fact IV that the samples submitted by plaintiff were hops of the quality specified in the contract, because there is no evidence to sustain the finding. [249]

13. The Court erred in its said finding of fact IV that plaintiff prior to the submission of samples, procured and was at the time the said samples were submitted and down to November 4, 1912, and thereafter, able to deliver the quality of hops specified in the contract, because there is no evidence to sustain that portion of said finding.

14. The Court erred in its said finding of fact VI that plaintiff duly performed and offered to perform all the acts and things on its part to be done and performed in accordance with its contract and said agreement for the sale of said hops, because there is no evidence to sustain said finding.

15. The Court erred in finding in its finding of fact VI that plaintiff duly performed and offered to perform all the acts, conditions and things on its part to be done, in accordance with its agreement, for the sale of said hops, because there is no evidence to sustain said finding.

17. The Court erred in finding in its finding of fact VII that the difference between the contract price and the market price of said hops at Milwaukee, Wisconsin, on November 4, 1912, was 6 cents a pound, because there is no evidence to sustain said finding, and there is no evidence to sustain a finding that the said difference was anything at all, but the evidence shows that the market value of choice Consumnes hops in Milwaukee, Wisconsin, on November 4, 1912, was 22½ cents per pound.

18. The Court erred in making the implied finding found in finding of fact VII to the effect that the plaintiff on November 4, 1912, tendered the said hops

to the defendant, because there is no evidence to sustain said finding.

19. The Court erred in finding in its finding of fact VII that the plaintiff has sustained damage in the difference between [250] the contract price of said hops and the market price or market value thereof at Milwaukee, Wisconsin, as it existed on November 4, 1912, because there is no evidence to sustain said finding.

20. The Court erred in finding in said finding of fact VII that the difference between the contract price of said hops and the market price or market value thereof at Milwaukee, Wisconsin, on November 4, 1912, was the sum of $22,200.00, because there is no evidence to sustain the finding nor any evidence to show that the difference between the contract price of said hops and the market value thereof was anything other than ½ cent per pound, the market value being in excess of the contract price of ½ cent per pound.

21. The Court erred in finding in said finding of fact VII that the plaintiff sustained damages in any additional sum for interest, because there is no evidence to sustain said finding.

22. The Court erred in finding in its finding of fact VII that the difference between the contract price and the price of said hops at Milwaukee on November 4, 1912, was 6 cents per pound, because there is no evidence to sustain the said finding or to sustain any finding that the said difference was anything, because the evidence shows that the value of hops of the character in question in Milwaukee on

November 4, 1912, was 22½ cents. The evidence is undisputed that the contract price was 20 cents per pound payable for said hops to be delivered in Milwaukee and there is no evidence that the market value or price of said choice Consumnes hops in Milwaukee, Wisconsin, was on the 4th day of November, 1912, any less than 16 cents per pound in Milwaukee, to wit, that it was any less than the sum of 14 cents per pound in Sacramento, California, plus the freight of 2 cents per pound from Sacramento to Milwaukee as aforesaid. The evidence shows that the [251] freight was not to be paid by the plaintiff but by the defendant and was not to be paid by the defendant to plaintiff but by defendant to the carrier who might carry the said hops to Milwaukee aforesaid, and even if hops were worth 16 cents per pound in Milwaukee the evidence shows that plaintiff had no hops in Milwaukee to deliver and hence all damages to plaintiff in that event would be on the basis of four cents per pound.

23. The Court erred in its finding of fact VII in finding that the plaintiff sustained damages in the sum of $22,200.00 for the reason that there was no evidence to show that the difference between the contract price of said hops and the market price or value thereof at Milwaukee, Wisconsin, as it existed on November 4, 1912, was the sum of $22,200.00 or any sum.

24. The Court erred in neglecting to find upon an issue of the case, to wit, the allegation of plaintiff's complaint that in the year 1912 after the month of August, 1912, plaintiff did procure 2,000 bales of

choice Consumnes hops of the said crop of 1912 in accordance with the terms and provisions of said contract and agreement, which same was denied by defendant in its answer.

This was prejudicial error, because the evidence shows that not only did plaintiff not procure 2,000 bales of Consumnes hops of the character referred to in the complaint, but that he was unable to procure the same because there were no such hops available in the market to be procured at the time of the breach of the contract, to wit, on November 4, 1912, and the evidence shows that the total production of Consumnes hops in the year 1912 was about 6,000 bales or a little more and that of the amount so produced 4,300 bales were raised by plaintiff itself of which 200 bales were by plaintiff admitted to be refuse and on November 4, 1912, the remaining bales of plaintiff's hops with the exception [252] of 1,264 bales had been sold, and the evidence shows that more than 2,400 bales of Consumnes hops grown by other than plaintiff, and which were not air dried, had been bought by persons not parties to this action prior to November 4, 1912, at prices in excess of 22 cents per pound in Milwaukee for such as were choice.

25. The Court erred in finding in said finding X that the allegations contained in paragraph II of the counterclaim are untrue, because there is no evidence to sustain the same and the evidence shows that plaintiff wrote the defendant on October 14, 1912, that it had received two of four samples forwarded it by defendant and if defendant would accept deliveries equal to the four samples that it would try and ar-

range deliveries accordingly, and also wrote on October 15, 1912, that if defendant would wire that they would accept hops equal to samples that they would arrange to accumulate such hops for defendant; that thereafter on October 15, 1912, defendant wired that they would accept hops on contract equal to samples forwarded by them, but insisted upon seeing samples on delivery before the shipments went forward; that thereafter on October 29, 1912, plaintiff accepted the said proposition and sent a line of samples Nos. 25 to 38 with the statement that they were ready to make delivery of hops equal to said samples and thereby a contract entirely different from that offered by plaintiff to defendant at the time of the forwarding of telegrams in 1911 was brought into existence and there is no proof whatsoever that samples 25 to 38 submitted by plaintiff to defendant were of the character and quality required by said contract, and that the defendant was compelled to buy hops to fulfill its requirements because of plaintiff's refusal to comply with its contract and actually purchased Pacific Coast hops for that purpose [253] to the loss by it of at least $1,251.13.

26. The Court erred in finding that during the month of August, 1911, the parties entered into a contract, as set forth in paragraph III of findings, because there is no evidence to sustain the finding, and the evidence shows that the minds of the parties did not meet on August 11, 1911, or at any other time in 1911 on any terms concerning the purchase and sale of 2,000 bales of hops, or any hops, and the evidence shows that the inchoate contract attempted

to be entered into between the parties in 1911 was intended to be followed up by a specific contract providing for terms and conditions of sale and time of delivery and that after the proceedings were inaugurated that plaintiff sent to defendant a form of contract signed by it in triplicate in which plaintiff set forth what it considered to be the terms and conditions and defendant rejected the same and refused to sign the same and that no contract wherein the parties' minds met was in existence until the receipt of the telegrams referred to in the last assignment.

The evidence shows that the contract actually in existence on November 4, 1912, provided that plaintiff was to furnish and defendant accept choice Consumnes hops equal to four certain samples of Consumnes hops sent by defendant to plaintiff and received by it about October 14, 1912, provided that plaintiff would send samples of the hops it intended to ship to defendant for inspection before shipment, the price being 20 cents per pound delivered at Sacramento plus freight to Milwaukee.

27. The Court erred in finding that the samples submitted to plaintiff by defendant prior to November 4, 1912, represented hops of the character and quality as called for by the contract and that plaintiff was ready, able and willing to deliver quantities [254] specified by the contract to the defendant because there is no evidence to sustain it, and the evidence shows that the samples of hops submitted by plaintiff to defendant were of two lots (a) one lot referred to in the correspondence, and hereinafter referred to as samples 1 to 20 received by defendant on

or about October 4, 1912, and (b) the other lot referred to in the correspondence, and hereinafter referred to as samples 25 to 38 forwarded by plaintiff to defendant on October 29, 1912, and that defendant forwarded to plaintiff four samples referred to in the correspondence, and hereinafter to be referred to as samples 21 to 24, which same were received by plaintiff about October 14, 1912, and were agreed to be the type of hops on which plaintiff agreed to make deliveries to defendant.

The evidence shows that samples 1 to 20 were never offered to plaintiff as being equal to said samples 21 to 24 and plaintiff never at any time tendered to defendant hops of a character represented by samples 1 to 20 after the consummation of the contract based on said samples, and never tendered plaintiff samples of any choice Consumnes hops equal to samples 21 to 24.

The evidence also shows that samples 25 to 38 were with one exception, to wit, sample No. 26, not Consumnes hops, and plaintiff had no hops of the character of sample No. 26 available for delivery.

The evidence also shows that plaintiff never did and could not have procured choice Consumnes hops equal to samples 21 to 24 on November 4, 1912, or at any time thereafter; and that samples 25 to 38, with the exception of one so-called sample No. 26, were not equal to samples 21 to 24, and the said so-called sample No. 26 was so small as not to be sufficient as a merchantable sample and plaintiff did not have and could not have procured 2,000 [255] bales of hops

of a character similar to said so-called sample No. 26, and was not able to make deliveries thereof.

28. The Court erred in finding that plaintiff was able to deliver the quantity of hops specified by the contract to the defendant because there is no evidence to sustain that portion of the finding quoted, and the evidence shows that the total number of bales of hops manufactured in the Consumnes district in 1912 was 6,000 bales or thereabouts, of which only 4300 bales were air dried; that prior to November 4, 1912, persons other than plaintiff had purchased over 2,400 bales of the kiln-dried hops raised in the Consumnes district and that plaintiff, itself, had sold 2,764 bales of air-dried hops prior to November 4, 1912, and that it was impossible for plaintiff to have delivered 2,000 bales of hops of the character mentioned in the contract on November 4, 1912, or of any character, or any Consumnes hops in excess of 1,400 bales; that the only evidence to the contrary is the evidence of E. C. Horst, president of the plaintiff itself, that he had 3,000 bales of choice Consumnes hops, which testimony is based on the witness' memory of facts contained in plaintiff's books and is contradicted by plaintiff's own books, which show that he only had 1321 bales on hand on November 4, 1912, and that said bales were of the character of samples 1 to 20. Said samples 1 to 20 were of goods classed as common hops, to wit, hops that were being sold at from 12 to 16 cents per pound which was the price of common hops and that said hops evidenced by samples 1 to 20 were green when picked and uncleanly picked.

The evidence shows that defendant did not reject

any hops tendered to it by plaintiff as being in accordance with the said contract except the so-called samples 25 to 38 which with the exception of sample No. 26 were not Consumnes hops and were not choice hops and sample No. 26 was not air dried, and choice air-dried [256] Consumnes hops were not able to be procured by plaintiff on November 4, 1912.

The evidence also shows that the defendant did not prior to the submission of samples or at any other time or at all procure any hops whatsoever for delivery to plaintiff.

29. The Court erred in finding that plaintiff performed all acts, conditions and things on its part to be done and performed in accordance with its contract because there is no evidence to sustain the finding, and the evidence shows that plaintiff never at any time attempted to deliver to defendant on its contract as it existed on November 4, 1912, any hops except those represented by samples 25 to 38, and none of said samples, with the exception of a so-called sample known as sample No. 26 which was too small for commercial use were Consumnes hops, air-dried or of a quality better than common or common to prime, and none of which was of a quality the value of which was in excess of 12 to 16 cents per pound, to wit, the price for common to prime hops, while the price of prime to choice and choice hops was 22½ cents in Milwaukee, and that the hops represented by samples 25 to 38 were not in the possession of plaintiff or capable of being procured by plaintiff, and plaintiff had not at any time procured them and was not able to procure hops of the character referred to

in the contract for delivery on November 4, 1912, and that he could not have obtained them at that time, or any time thereafter.

30. The Court erred in finding the difference between the market price of said hops, and the contract price on November 4, 1912, was 6 cents per pound because the evidence shows that the value of choice hops in Milwaukee, on November 4, 1912, or thereabouts, was 22½ cents per pound, and that the market price of choice Consumnes hops which was 22½ cents per pound delivered in Milwaukee was in excess of the contract price. The evidence [257] also shows that plaintiff did not pay any freight on any hops tendered to defendant and that so much of the price at Milwaukee as was due to freight was not lost by plaintiff.

31. The Court erred in finding that plaintiff has sustained damages in the difference between the contract price of said hops and the market price at Milwaukee as existed on November 4, 1912, in the sum of $22,200.00, and also an additional sum for interest on said amount from November 4, 1912, down to and including the entry of judgment at the rate of 6% per annum or any damage whatsoever either by way of amount or interest, because the evidence shows that the price of hops of the character referred to in the contract in Milwaukee November 4, 1912, or a short time thereafter, was 22½ cents per pound, and defendant was not damaged in any amount or at all; that the price to be paid to plaintiff was 20 cents f. o. b. cars Sacramento, and none of the hops were shipped or incurred any freight charges because of

the said contract; that the only evidence as to contract price being other than 22½ cents Milwaukee on November 4, 1912, or a short time thereafter, came from witnesses who did not know of any sales in the market or whose testimony was unworthy of belief, and of witnesses who testified as to the price of common and common to prime hops and not to choice hops of the quality referred to in the contract, and the plaintiff was not damaged by any loss of interest because the amount of the contract was not liquidated or capable of being ascertained, and the total amount of hops to be delivered was not accurate nor capable of being ascertained, and that the difference in price at the time of delivery was not accurate nor capable of being ascertained, and that there is no evidence to show any damage because of interest or loss of interest. [258]

32. The Court erred in finding that plaintiff was damaged in an amount equivalent to interest from November 4, 1912, down to the entry of judgment at the rate of 6% per annum, because there is no evidence to sustain the finding and the amount of the claim was never established or liquidated or certain, or capable of being made known, and the evidence shows that at no time was defendant able to ascertain the correct amount to be paid by it to plaintiff, because the actual number of pounds of hops to be delivered and the actual market price thereof per pound was never capable of being ascertained by the defendant.

33. The Court erred in finding that the plaintiff was entitled to interest on the sum of $22,200.00 at

the rate of 6% per annum from the 4th day of November, 1912, down to the date of judgment as a part of said damages or otherwise because there is no evidence to sustain the finding and the evidence shows that at no time was the amount due from defendant to plaintiff fixed or liquidated, and at no time was defendant able to ascertain the correct amount to be paid to plaintiff.

34. *The erred* in finding as a portion of finding VII that the interest was to be added to the sum of $22,200.00 as the full amount of damages sustained by plaintiff, because there is no evidence to sustain the finding, and there is no evidence to show that the judgment should have been $22,200.00 or that there should have been any interest thereon or that plaintiff sustained any damages or that if it did sustain any damage it was not entitled to any interest because the amount of the claim was unliquidated and unascertained.

ERRORS IN AND CONCERNING CONCLUSIONS OF LAW.

35. The Court erred in finding as a conclusion of law that the plaintiff is entitled to recover judgment against defendant. [259]

36. The Court erred in finding its conclusion of law that the plaintiff is entitled to recover judgment against defendant for the principal sum of $22,200.00, because the findings show that the difference between the contract price and the market price of hops at Milwaukee on November 4, 1912, was 16 cents per pound, and the evidence shows that plaintiff had no hops in Milwaukee for delivery at that time. Conse-

quently, the only damage to plaintiff on facts shown in the findings was 4 cents per pound or $14,800.00, and plaintiff on the facts shown by the findings was only entitled to recover $14,800.00.

37. The Court erred in finding as a conclusion of law that the plaintiff is entitled to recover judgment for interest on the said sum at the rate of 6% per annum from the 4th day of November, 1912, or any other sum or at all, because the amount of hops to be delivered and the damage per pound for nondelivery thereof was never known to defendant and it was never able to ascertain the amount and the said amount was never liquidated and plaintiff was never entitled to interest, and the findings show that the amount to be paid was not capable of being ascertained.

ERRORS IN RULINGS DURING THE COURSE OF THE TRIAL.

The Court erred in the following rulings during the course of the trial over the exceptions of the attorneys for defendant.

38. In permitting the plaintiff to introduce in evidence the night letter from plaintiff to defendant, dated November 5, 1912, because the same was objected to as an offer of a compromise which is in no way connected with any contract or with any of the issues of the case, and tended to prejudice the Court and was a [260] self-serving declaration.

39. In permitting the introduction of the night letter from E. Clemens Horst to the Pabst Brewing Company, dated November 7, 1912, for the same reasons as given on the last assignment.

40. The Court erred in permitting the introduction of the letter from E. Clemens Horst dated November 8, 1912, to Pabst Brewing Company, for the same reasons as given on the last assignment.

41. The Court erred in permitting the introduction of the letter from E. Clemens Horst to the Pabst Brewing Company. dated October 18, 1912, because the same was not addressed to any issue of the case and was a self-serving declaration intended as an argument to be used in the lawsuit and was immaterial.

42. In overruling objection to question asked the witness E. C. Horst: "Did you have 2,000 bales of choice air-dried Consumnes hops on hand when you communicated with them (referring to Pabst Company) on November 4, 1912?" which, after discussion, was changed to read, "Did your company have on hand from the time the hops were picked and baled up to and after December 4th, 2,000 bales of choice Consumnes hops grown in the district you have described?" to which the witness Horst answered "Yes, I had more than 2,000 bales," because the testimony was irrelevant and immaterial because the contract of November 4, 1912, was not for delivery of choice Consumnes hops alone, but of choice Consumnes hops equal to samples 21 to 24 forwarded by defendant to plaintiff and received by them and accepted as the basis of the contract completed October 23, 1912.

43. The Court erred in overruling the objection to the question asked witness Horst: "Did you during the year 1912 send any hops grown by you in the Consumnes district to the [261] defendant, Pabst

Brewing Company?" on the ground that it was immaterial and irrelevant unless the hops were sent to Pabst subsequent to October 23, 1912 when the agreement was entered into with reference to the four samples, and after the contract had required the samples furnished to be equal to the four samples forwarded by Pabst to Horst as type samples.

The answer was that he sent samples 1 to 20 early in October, 1912.

44. The Court erred in overruling the objection to the question asked witness Horst: "How did the hops that you have just referred to (referring to hops manufactured by Horst himself and covered by original samples 1 to 20) compare to samples 12 to 15 inclusive, (which were the four type samples originally known as 21 to 24)?" on the ground that the same was irrelevant and immaterial; because the samples had never been tendered to defendant as the basis of a delivery after October 23, 1912, when the final contract was entered into. The answer was that they were the same grade of hops.

45. The Court erred in overruling the question asked witness Horst: "On November 4, 1912, did you have on hand, and were you able to deliver if acceptance had been had 2,000 bales of strictly choice Consumnes hops to the defendant?" on the ground that the same was irrelevant and immaterial unless the hops on hand were of a character equal to the type samples.

The answer being that the plaintiff had such quantity of hops.

46. The Court erred in overruling the question

asked of witness Horst: "What sales did you make in November, 1912, of Consumnes hops that you have testified to (referring to hops equal to the original samples 1 to 20)?" On the ground that the same is [262] irrelevant and immaterial unless it was not shown that the hops were of the character equal to the four samples.

The answer was that he sold various lots for varying figures from 12 cents to 16 cents.

47. The Court erred in instructing defendant's attorney to curtail further examination as to the time when hops ripened in the year 1912 during the examination of witness Horst, wherein the Court said: "I want this case confined to material things. Leave out all these examinations into the mere theory and immaterial matter." Because the evidence would have shown that the plaintiff picked its hops which were subsequently represented by samples 1 to 20 very early in the season, prior to the time of their ripening, in order to take advantage of a market that was insistent for early delivery because of brewers' shortage in stock due to light purchases in the year 1911 on account of high price, and thereby the evidence would have shown that Horst's samples were common to prime because of the greenness of the hops, and the evidence of other witnesses to that point would have been corroborated.

48. The Court, erred in overruling objection to question asked witness George: "Could you expect to sell 2,000 bales of choice Consumnes hops at Milwaukee at the price which then prevailed in the market, in thirty days?" On the ground that the

same was immaterial, irrelevant and conjectural, and that the market in cities similarly situated—Chicago, St. Louis and the like—was available as well as Milwaukee and it was error to confine the market to Milwaukee alone.

The witness answered that it would not be an easy matter to sell 2,000 bales within thirty days.

49. The Court erred in refusing to permit defendant to cross-examine witness George as to the relative value of Oregon hops [263] and Consumnes hops, the question being: "How much more were Oregons selling than Consumnes?" Because the testimony shows that Oregon and Consumnes hops were of the same relative value; that the witness had testified as to the value of hops in Milwaukee or thereabouts on November 4, 1912, and based his opinion solely upon the price of Consumnes hops sold by himself alone, and the defendant had the right to test the witness' memory on quotations on hops of the same general character as Consumnes hops.

50. The Court erred in refusing to permit the witness George to answer the question asked by defendant: "If other Consumnes hops at that time were selling to brewers at from 22 to 24 cents per pound would not that (a sale of Horst's manufactured hops for 16 cents) indicate that these hops which were sold by you for 16 cents to the Naragansett Brewing Company were a poor quality?" Because the evidence shows that this was the only witness, other than Horst himself, who testified to the price of choice Consumnes hops being 16 cents which was the figure accepted by the Court as the price of hops, and that

the witness was testifying as an expert in hops, and it was material to know whether the price paid for the hops of the class of samples 1 to 20 did not prove that the hops instead of being choice were, as a matter of fact, common; because the evidence shows that other choice hops were being sold at the time from 22 cents to 24 cents a pound, and no choice hops were being sold for less than 19 cents per pound, and no objection to the question was made by plaintiff.

51. The Court erred in overruling objection to the question asked witness Flint: "Could you in your opinion have sold [264] a large quantity of hops to defendant in one day in Milwaukee in November, 1912?" Because it followed immediately a question asking "What time in your opinion would it require to sell 2,000 bales of choice Consumnes hops in Milwaukee?" And defendant's attorneys objected on the grounds that it was irrelevant and immaterial and not addressed to any issue in the case.

The answer was that it would be difficult to sell that quantity of hops in that year during the whole season.

52. The Court erred in overruling defendant's motion to strike out the testimony of witness Horst that the plaintiff had over 2,000 bales of hops on hand on November 4, 1912, on the Coast, because the evidence shows that he knew nothing of the facts as to the whereabouts of the hops in question and that he was entirely dependent upon the books of the company and that the books of the company were not in court, and the books were the best evidence, and no explanation was made why the books of the company

were not on hand; and the evidence given by the plaintiff was not the best evidence and was hearsay. The witness himself testified that he had to go to the books to get the exact figures.

53. The Court erred in overruling the objection of defendant to the question asked witness Marks on cross-examination: "What would be the effect on the market of putting 2,000 bales of hops that were not choice?" On the ground that it was not addressed to any issue in the case, the issue being as to choice Consumnes hops.

The answer was that it would take from four to six weeks.

54. The Court erred in asking witness Zaumeyer to select four Consumnes type samples from a large number of samples before the Court, because the samples were not in the condition in which [265] they were offered plaintiff.

The effect was to nullify the testimony of the witness. And a stipulation had been entered into by counsel that no further evidence of quality would be introduced at the trial, and the evidence shows that the samples were of such condition at that time that no person would have been able to have ascertained their quality at the time.

55. The Court erred in overruling the question asked witness Horst on rebuttal, as follows: "I would ask you if you had a conversation with Gustav Pabst, the President of the defendant, in 1912 with reference to this contract?"

On the ground that the question was irrelevant, immaterial and not rebuttal.

The answer being that the defendant through Mr. Pabst attempted to sell back the 2,000 bales contracted for, and that Mr. Horst remembered that Pabst wanted a profit of $10,000.00, or thereabouts, and that Horst offered them a profit of $5000.00, or thereabouts.

56. The Court erred in overruling the question asked witness Sweeney during cross-examination: Q. "Suppose you had 2,000 bales of Horst's hops in Milwaukee which you say are not choice, what would be the market price of these two thousand bales in November and December, 1912?"

Mr. POWERS.—We object to that as irrelevant, immaterial and incompetent and not proper cross-examination. Objection overruled and exception noted. Exception.

The answer being that they would be worth nineteen cents.

57. The Court erred in refusing to allow defendant to withdraw its counterclaim. The effect being to prevent defendant from maintaining its position that the minds of the parties had [266] never met.

58. The Court erred in overruling question asked witness Horst in rebuttal as follows: Q. "Were the four samples sent out by the Pabst Brewing Company to you on the table at that time?" (Referring to the time Mr. Zaumeyer testified in the court.) The objection being that the question was immaterial, irrelevant and incompetent and a breach of the stipulation entered into in open court that there should be no testimony introduced as to quality at

the second trial except such as had been introduced at the first trial. Objection overruled and exception.

The answer being that the samples were on the table at that time.

WHEREFORE, the said defendant prays that the judgment in favor of plaintiff herein against the defendant be reversed and that the said District Court of the United States in and for the Northern District of California, Second Division, be directed to grant a new trial in said cause.

HELLER, POWERS & EHRMAN,
Attorneys for Plaintiff in Error.
(Defendant in Court Below.)

[Endorsed]: Filed Apr. 3, 1919. [267]

[Title of Court and Cause.]

Order Allowing Writ of Error.

Upon motion of Heller, Powers & Ehrman, attorneys for defendant in the above-entitled action, and upon the filing of the petition for writ of error and assignment of errors,—

IT IS HEREBY ORDERED that a writ of error as prayed for in said petition be allowed and that the amount of the supersedeas bond to be given by the defendant upon said writ of error be and the same is hereby fixed at the sum of Thirty-five Thousand Dollars ($35,000.00), and that upon the giving of said bond all further proceedings in this court be suspended, stayed and superseded pending such deter-

mination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated April 3, 1919.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Apr. 3, 1919. [268]

[Title of Court and Cause.]

Certificate of Clerk of United States District Court to Transcript of Record on Writ of Error.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing two hundred and seventy pages (270) pages, numbered from 1 to 270 inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $99.00; that said amount was paid by the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court,

this 23d day of December, A. D. 1919.

[Seal] WALTER B. MALING,

Clerk of the United States District Court for the Northern District of California.

By Thomas J. Franklin,

Deputy Clerk. [271]

[Title of Court and Cause.]

Writ of Error.

United States of America,—ss.

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Northern District of California, Second Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Pabst Brewing Company, a corporation, plaintiff in error, and E. Clemens Horst Company, a corporation, defendant in error, a manifest error hath happened, to the great damage of the said Pabst Brewing Company, a corporation, plaintiff in error, as by its complaint appears;

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this

Writ, so that you have [272] the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 3d day of April, in the year of our Lord One Thousand Nine Hundred and Nineteen.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by:

WM. C. VAN FLEET,
United States District Judge. [273]

Service of the within Writ of Error and also Assignments of Error is hereby admitted this 3d day of April, 1919.

DEVLIN & DEVLIN,
W. H. CARLIN,
MAURICE E. HARRISON,
Attorneys for Plaintiff.

Return to Writ of Error.

The answer of the Judges of the District Court of the United States of America, for the Northern Dis-

trict of California, to the within writ of error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained.

By the Court:

[Seal] WALTER B. MALING,

Clerk U. S. District Court, Northern District of California.

By Thomas J. Franklin,
Deputy Clerk.

[Endorsed]: April 4, 1919. [274]

[Title of Court and Cause.]

Citation on Writ of Error.

United States of America,—ss.

The President of the United States to E. Clemens Horst Company, a Corporation, GREETING:

You are hereby cited and admonished to be and appear at a United States *Circuit of* Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, Second Division, wherein Pabst Brewing Company, a corporation, is plaintiff in

error, and you are defendant in error, to show cause, if any thereby, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. C. VAN FLEET, United States District Judge for the Northern District of California, this 3d day of April, A. D. 1919.

WM. C. VAN FLEET,
United States District Judge. [275]

Service of the within citation is hereby admitted this 3d day of April, 1919.

DEVLIN & DEVLIN,
W. H. CARLIN,
MAURICE E. HARRISON,
Attorneys for Plaintiff.

[Endorsed]: Apr. 4, 1919. [276]

[Endorsed]: No. 3427. United States Circuit Court of Appeals for the Ninth Circuit. Pabst Brewing Company, a Corporation, Plaintiff in Error, vs. E. Clemens Horst Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Northern Division of the United

States District Court of the Northern District of California, Second Division.

Filed December 23, 1919.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

PABST BREWING COMPANY, a Corporation,
Plaintiff in Error,

vs.

E. CLEMENS HORST COMPANY, a Corporation,
Defendant in Error.

Stipulation and Order Extending Time to and Including December 30, 1919, to File Record and Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error may have to and including the 30th day of December, 1919, within which to prepare, print and file the record and docket the cause in the above-entitled court.

Dated: November 25, 1919.

HELLER, POWERS & EHRMAN,
Attorneys for Plaintiff in Error.
DEVLIN & DEVLIN,
MAURICE E. HARRISON,
EDWARD C. HARRISON,
Attorneys for Defendant in Error.

It is so ordered.

Dated: November 26, 1919.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: No. 3427. In the United States Circuit Court of Appeals for the Ninth Circuit. Pabst Brewing Company, a Corporation, Plaintiff in Error, vs. E. Clemens Horst Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time to File Transcript. Filed Nov. 28, 1919. F. D. Monckton, Clerk. Refiled Dec. 23, 1919. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

PABST BREWING COMPANY, a Corporation,
Plaintiff in Error,

vs.

E. CLEMENS HORST COMPANY, a Corporation,
Defendant in Error.

Stipulation as to Printing Portions of Record on Appeal.

Counsel for the respective parties in the above-entitled action hereby stipulate under Subdivision "A" of Rule 23 that they request the above-entitled court to print the following portions of the record for hearing on the Writ of Error, viz.:

1. All pleadings including amendments to complaint made at the trial, omitting therefrom all verifications and endorsements except dates of filing and titles except in first instance.
2. Findings of fact and conclusions of law.
3. Decisions and judgment of Court.
4. Bill of exceptions.
5. Assignments of error.
6. Order allowing writ of error.
7. Last order extending time to file record in Appellate Court.

HELLER, POWERS & EHRMAN,
Attorneys for Plaintiff in Error.
DEVLIN & DEVLIN,
MAURICE E. HARRISON,
Attorneys for Defendant in Error.

Dated December 22d, 1919.

[Endorsed]: No. 3427. In the United States Circuit Court of Appeals for the Ninth Circuit. Pabst Brewing Co., Plaintiff in Error, vs. E. Clemens Horst Co., Defendant in Error. Stipulation as to Printing Portions of Record on Appeal. Filed Dec. 23, 1919. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

PABST BREWING COMPANY, a Corporation,
Plaintiff in Error,

vs.

E. CLEMENS HORST COMPANY, a Corporation,
Defendant in Error.

Stipulation for Correction of Record and Transcript.

IT IS HEREBY STIPULATED by and between the parties to the above-entitled cause that the testimony and proceedings hereinafter set forth are a part of the Bill of Exceptions in said cause and have been inadvertently omitted from the record upon the writ of error therein; and it is stipulated that such record may be amended by the insertion of said testimony, and that this stipulation may be printed as a part of the bill of exceptions and as a part of the record for hearing on the writ of error herein.

The testimony so omitted from the record should have been inserted after page 118 thereof, and is as follows, that is to say:

Testimony of Flood V. Flint, for Plaintiff.

"FLOOD V. FLINT, called as a witness for plaintiff:

Direct Examination.

(By Mr. DEVLIN.)

I live in Sacramento City and am a hop dealer and grower in the Sacramento Valley, and have been for 30 years. I have grown hops in the Consumnes

(Testimony of Flood V. Flint.)

district for 10 years. Am still engaged there. I have also had experience in growing hops in the Riverside district, and am still engaged there. I have bought as a dealer mostly on a commission. Buying and selling hops for 25 years. Bought all qualities. I made examination of a certain sample of hops made by Mr. Horst in 1912, and put my initials on them. The quality of those hops were choice. I also examined four samples submitted by Pabst to Horst. The hops were of the same quality. I kept familiar with the price of hops. I get prices by daily telegrams, by offering and receiving offers. Hops are sold by private solicitation. When we have hops to sell there is the usual broker's fee for selling hops. It varies from one-half a cent to two cents per pound. I am acquainted with the market price of choice Consumnes hops in 1912. The price in Milwaukee is based on the price here, plus freight. The market price of Choice Consumnes hops in Milwaukee is about 14 cents, in November, 1912.

Q. What time, in your opinion, would it require to sell 2,000 bales in Milwaukee, of choice Consumnes hops?

Mr. POWERS.—We object to that as immaterial, irrelevant and incompetent as to when 2,000 bales could be sold in Milwaukee.

The COURT.—Objection overruled. Exception.

EXCEPTION No. 10½.

That is according to how many men you put out selling them; in order to sell 2,000 bales, there should be more than one man selling them.

(Testimony of Flood V. Flint.)

It was stipulated that defendant should be considered as having made objections to this line of questioning and exceptions reserved.

Cross-examination.

(By Mr. POWERS.)

I have been quite friendly with Mr. Horst. A hop that is sound, the best average hop of the section is a choice hop. An immature hop cannot be choice. It must be well filled, have a proper amount of lupulin for brewing purposes, the color must be uniform. With reference to sample 33 shown, it is pretty hard to judge a hop of that kind after the age of it. Hops that are opened do not retain their freshness.

Q. What hops do you know to have sold at 14 cents in Milwaukee in November or thereabouts?

A. I do not know of any that were sold at that time in Milwaukee. I did not sell any in Milwaukee.

Mr. POWERS.—Q. What choice Consumnes hops do you know to have been bought in Sacramento at 14 cents a pound, or thereabouts? A. In November?

Q. November 4, 1912, or thereabouts.

A. That would make the price 12 cents, and I cannot recall, it is so long ago; I cannot recall any at this time.

Q. Do you know of any sales of choice Consumnes hops at 12 cents or thereabouts in November, 1912?

A. No, I cannot recall back, but I do know that offers were made to growers on the basis of 12 cents for Consumnes.

Q. For choice Consumnes hops? A. Yes.

Q. Who made them? A. I cannot recall that.

(Testimony of Flood V. Flint.)

Q. To whom were they made?

A. I cannot recall that, either.

Q. Do you know Otto Koch? A. Yes.

Q. Do you know that in November, 1912, he was attempting to buy choice Consumnes hops for 17 and 18 cents a pound? A. In that month?

Q. November, 1912. A. I can't remember it.

Q. Have you any recollection of any sales of Consumnes hops of purchases in the months of November and December, 1912?

A. No. I have not them in mind now; I cannot recall them.

Q. What do you base your estimate on, then?

A. I can recall that we had offers of 12 cents, and in the ordinary daily business we offered according to our instructions, but I cannot remember any distinct ones.

Q. From whom was the offer made?

A. I cannot remember so that I can tell you; it is too far back.

Q. If it should appear in the testimony that Mr. Drescher—do you know Mr. Drescher? A. Yes.

Q. Is he a hop merchant?

A. Yes, hop merchant.

Q. If it should appear that Mr. Drescher had sold hops, choice hops, in the vicinity of November 1, 1912, for 20 cents, 19 cents and 18 cents, and that Mr. Sweeney—do you know Mr. Sweeney? A. Yes.

Q. And that Mr. Sweeney had bought Consumnes hops for 18¾ cents and sold them for 22 cents; that Mr. Koch had bought Consumnes hops for 19 cents,

(Testimony of Flood V. Flint.)

would that in any way affect your idea of the market value in November, 1912?

A. The selling by Mr. Drescher would not, nor Sweeney.

Q. Why not?

A. Because they have special facilities. Mr. Drescher handles the output of the Pabst Brewing Company, and possibly might get a special offer from them. Mr. Sweeney is the salesman for a good many people. They are in a position to get favorable offers where the ordinary grower and the ordinary buyer does not. That happens very often in business transactions, that they may come in and may get a dozen bids, and they represent half a dozen people. We based our price on these telegrams. I cannot recall any distinct and separate offer that was made me; it is too long ago to carry it in my head.

Q. You were not concerned with the price after you turned the hops over to the dealer?

A. I made a settlement and that settled it.

Q. What is the usual profit of a dealer when hops are in the neighborhood of 18 to 20 cents a pound from dealer to brewer?

A. Seldom less than 2 cents a pound. He gets what he can, of course.

Q. Did you ever transact any business from dealer to brewer?

A. I cannot recall transacting any business from dealer to brewer; I don't have it in mind, but I handled quite a few Consumnes besides my own."

The proceedings so omitted from the record should have been inserted before the close of the case on the part of the plaintiff; and it is stipulated that at that time, the following stipulation was made upon the trial:

> "It is stipulated that plaintiff may file an amendment to the complaint with the understanding that the amendments were considered denied by the defendant and so ordered."

Said amendment to the complaint was filed June 12, 1918.

Dated: January 2, 1920.

HELLER, POWERS & EHRMAN,
Attorneys for Defendant in Error.
DEVLIN & DEVLIN,
MAURICE E. HARRISON,
Attorneys for Defendant in Error.

[Endorsed]: No. 3427. United States Circuit Court of Appeals for the Ninth Circuit. Pabst Brewing Company, a Corporation, Plaintiff in Error, vs. E. Clemens Horst Company, a Corporation, Defendant in Error. Stipulation for Correction of Certified Transcript of Record and Printed Transcript of Record. Filed Jan. 3, 1920. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

PABST BREWING COMPANY, a Corporation,
Plaintiff in Error,

vs.

E. CLEMENS HORST COMPANY, a Corporation,
Defendant in Error.

Stipulation for Correction of Record and Transcript.

IT IS HEREBY STIPULATED by and between the parties to the above-entitled cause that the testimony and proceedings hereinafter set forth are a part of the bill of exceptions in said cause and have been inadvertently omitted from the record upon the writ of error therein; and it is stipulated that such record may be amended by the insertion of such testimony, and that this stipulation may be printed as a part of the bill of exceptions and as a part of the record for hearing on the writ of error herein.

The testimony so omitted from the record should have been inserted after the last words of the cross-examination of F. W. George, on page 118 of the record, and before the testimony of Flood V. Flint, and constitutes a part of the continuation of said cross-examination, and is as follows:

> "WITNESS.—(Continuing.) I have been employed by plaintiff for a year and a month, and I have been employed by him about seven or eight years. I was not employed by him in 1912. My brother was. Mr. Horst's wife is a cousin of mine. We are on intimately friendly rela-

tions. I have helped him to prepare the case very hastily. I have not had anything to do with this case until two days ago."

Dated January 6th, 1920.

HELLER, POWERS & EHRMAN,
Attorneys for Plaintiff in Error.
DEVLIN & DEVLIN,
MAURICE E. HARRISON,
Attorneys for Defendant in Error.

[Endorsed]: No. 3427. In the United States Circuit Court of Appeals for the Ninth Circuit. Pabst Brewing Company, a Corporation, Plaintiff in Error, vs. E. Clemens Horst Company, a Corporation, Defendant in Error. Stipulation for Correction of Certified Typewritten Transcript of Record and Printed Transcript of Record. Filed Jan. 6, 1920. F. D. Monckton, Clerk.

NO. 3427.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

PABST BREWING COMPANY, a corporation,
Plaintiff in Error,

vs.

E. CLEMENS HORST COMPANY, a corporation,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR, PABST BREWING COMPANY.

HELLER, POWERS & EHRMAN,
Attorneys for Plaintiff in Error.

HENRY W. STARK and JAMES D. SHAW,
Of Counsel.

NO. 3427.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

PABST BREWING COMPANY, a corporation,
Plaintiff in Error,

vs.

E. CLEMENS HORST COMPANY, a corporation,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR, PABST BREWING COMPANY.

STATEMENT OF CASE.

This action was originally brought by the E. Clemens Horst Company, a New Jersey corporation, hereinafter called the "Horst Company," against Pabst Brewing Company, a Wisconsin corporation engaged in the manufacture of beer at Milwaukee, and hereinafter called the "Pabst Company," to recover general damages alleged to have been sustained as the result of the claimed refusal of the Pabst Company to perform a contract for the purchase of 2,000 bales of hops from the Horst Company.

The case was originally tried by a jury and a verdict returned in favor of the Horst Company upon which judgment was entered.

On error to this court the issues involved were defined and discussed and various rulings of the trial court condemned and the judgment reversed. (See 229 Fed. Rep. 913.)

On retrial a jury was waived. The trial court made findings of fact in favor of the Horst Company and judgment was entered against the Pabst Company for $30,902.68 damages, interest and costs.

It is to review this judgment that error is brought.

The essential facts necessary for an understanding of the errors relied upon are as follows:

The Horst Company is the owner of a hop ranch of about 400 acres in the Consumnes river district in Sacramento County. The entire Consumnes district consists of about 800 or 900 acres.

The Consumnes hops are comparable with hops grown in certain other regions on the Pacific Coast.

The method of marketing these hops is somewhat distinctive. All sales are made by salesmen traveling around among the brewers and by private solicitation. (See testimony of E. Clemens Horst, R. p. 47.) Such hops are not handled in the manner common to other commodities which are shipped to depots or storage warehouses in various parts of the country and sold from time to time to meet the demands of the community tributary to such depot or warehouse.

In the month of August, 1911, the Horst Company made a contract by wire with the Brewing Company for the sale of 2,000 bales of *choice air-dried Consumnes hops* of the 1912 crop at 20c per pound delivered at Milwaukee, the purchaser in addition thereto paying the freight from Coast.

On November 4, 1912, the Pabst Company declared that the hops which the Horst Company proposed to deliver and samples of which were exhibited were not of the quality specified in the contract. Thereupon this action was commenced.

THE FINDINGS OF THE COURT BELOW.

The lower court held against the contention of the Pabst Company that the contract of August, 1911, was thereafter changed and held against its further contention that the hops tendered by the Horst Company through exhibition of samples were not of the quality called for by the contract. Although we believe the greater weight of the evidence is against these findings we do not seek to have them reviewed because we believe it can be demonstrated that the two further findings to be presently mentioned are so hostile to all of the credible evidence that the judgment under review must be reversed or at least reduced to a nominal sum. The two findings which we assail as unsupported by and opposed to all of the credible evidence are:

(1). The trial court found that the market value of the hops at the time and place of delivery was 6c per

pound under the contract price or 14c at Milwaukee, plus freight. This was the market price which the court fixed for comparison with the contract price as the basis for computing damages. (Finding VII, R. pp. 20, 21.)

(2). Pursuant to the determination of this court in 229 Fed. Rep. 913 that the ability of the Horst Company to perform was one of the issues precedent to recovery by that Company the lower court determined that the Horst Company was ready, able and willing to deliver hops of the quantity and quality specified in the contract. (Finding IV, R. p. 20.)

The two fundamental errors now urged relate to the insufficiency of the evidence to support these two findings. Errors in rulings on evidence relate only to evidence affecting these findings.

ERRORS RELIED UPON.
(Specification of Errors.)

The court erred:—

(1). In finding that the market price of hops of the quality specified in the contract at the time and place of delivery was 6c per pound under the contract price because such finding is against all the credible evidence and is not sustained by the evidence. (Assignment of errors 17, 19, 20, 22, 23, 30 and 31; R. pp. 242, 243, 244 and 251.)

(1a). In permitting the witness George to describe the depressing effect upon the price at Mil-

waukee of attempting to sell so large a quantity as 2,000 bales of hops. (Assignment of error 48; R. p. 257.)

(1b). In refusing to permit the Pabst Company to cross-examine the witness George as to the value of Oregon hops which were shown by the testimony to command substantially the same market price as Consumnes hops, thereby permitting the witness to base his opinion of market price at Milwaukee upon the sale of a comparatively small quantity of Consumnes hops at a point very remote from Milwaukee. (Assignment of error 49; R. p. 258.)

(1c). In sustaining the Horst Company's objection to the question propounded by the Pabst Company to the witness George for the purpose of ascertaining whether or not the small quantity of hops sold by the witness to the Narragansett Brewing Company for 16c per pound was of the same quality as large quantities of Consumnes and other Pacific Coast hops then being sold at from 22c to 24c per pound. (Assignment of error 50; R. p. 258.)

(2). In finding that the Horst Company was ready, able and willing to perform the contract mentioned in the findings. (Assignment of errors 4, 6, 7, 8, 10, 14, 15; R. p. 240, 241, 242.)

(2a). In denying the defendant's motion to strike out the testimony of the witness Horst predi-

cated upon books which were not produced and the absence of which was unexplained, to the effect that the Horst Company had 2,000 bales of hops on hand on November 4, 1912, on the Coast, for the reason that the incompetency of such evidence was determined by the decision in 229 Fed. Rep. 913 and such evidence was not the best evidence and was hearsay. (Assignment of error 52; R. p. 259.)

BRIEF OF THE ARGUMENT.

We will discuss only the two basic propositions above mentioned, considering in connection with each of such two propositions the rulings upon evidence affecting the respective findings challenged.

FIRST.

The finding that the market price of hops of the quality specified in the contract at the time and place of delivery was 6c lower than the contract price is unsupported by competent evidence. The court here considered certain incompetent evidence. All of the competent evidence, and it is voluminous, shows the market price at the time and place of delivery to have been at least equal to the contract price.

Starting with the rule which must be kept constantly in mind that the purpose of the law in awarding damages is to afford compensation, no more and no

less, to the injured party, we approach the application of such rule to the facts of this case. Upon review of the result of the first trial this court held:

> "In this case the measure of damages was the difference between the contract price and the market price at the time and place of delivery, because there was no allegation in the complaint that the hops were resold, or of the price at which they were resold." (229 Fed. Rep. 917.)

The court further held:

> "The only purpose of fixing the date of delivery would be to fix a date for the ascertainment of the market price, and under the circumstances of this case that date should be fixed as of November 4, 1912, or soon thereafter." (229 Fed. Rep. 919.)

The propositions quoted are obviously right, but whether right or wrong they are the law of the case.

4 Corpus Juris 1213;

National Surety Co. vs. Kansas City Hydraulic Brick Co., 182 Fed. 54;

Columbia Chemical Co. vs. Duff, 184 Fed. 876;

U. S. vs. Axman, 193 Fed. 644.

The facts now presented by the record must be considered in light of these fixed rules.

It is necessary to consider the evidence on market price with reference to the state of completion of the raw material. It appears that the price received by the grower from the dealer or sales agency acting as an

intermediary was from 1c to 2c per pound less than the price paid by the brewers, exclusive of freight, who, like the plaintiff in error, were the consumers of the hops. (R. pp. 195, 208; Horst 58-60; also R. pp. 175-133-144-175-195-208-229.) In other words, the expense of maintaining and operating sales organizations for soliciting orders from brewers was an additional cost included in the price of the product and corresponded to one of the processes through which the raw material passed up to the time it was offered to the brewers. The Horst Company, in selling to the Pabst Company, would have incurred this additional expense. It is, therefore, the market established by sales to brewers which must afford the criterion in this case. Had the Pabst Company been sustained in its contention that the Horst Company defaulted in refusing to deliver hops corresponding to the quality specified by the contract the market price at the time and place of delivery to which the Pabst Company's damages in such event would have been referable would, necessarily, be *the market as fixed by sales to consumers.*

To fix damages by comparing the contract price specified in a contract made upon the solicitation of a brewer's order with a market price determined not by sales to brewers but by the net price received by the growers on the Coast involves a duplication of damages.

Such a process, in effect, uses as a basis for damages a comparison between the contract price for a commodity at an advanced state of completion with the

market price of the same commodity in an earlier state of completion and when important expenditures necessary to bring the commodity to its final stage have not been made. In other words, it compares the contract price of one thing with the market price for a substantially different thing. It gives to the seller not only compensation but rewards him in addition with a part of the cost of manufacture of the commodity involved.

In considering the evidence we shall, therefore, deal with the market as fixed by sales to brewers.

Under the decision in 229 Fed. Rep. we shall necessarily deal with the market price at the time and place of delivery. We shall deal with the market price of Consumnes hops regardless of whether the same are air-dried (229 Fed. Rep. 919) and we shall consider the market price of other Pacific Coast hops of equal quality where the undisputed evidence shows that the market value of such hops is the same as that of Consumnes. (229 Fed. Rep. 919-920.)

It is, of course, apodeictical that mere opinion evidence as to the market price of hops at a given place is of no probative force if it is not predicated upon actual sales. This is especially true where evidence of the price governing many actual sales of substantial quantities is presented.

Primarily, therefore, the most conclusive and convincing evidence should be that of sales made at Milwaukee on or about November 4, 1912. The hops in question and other similar hops are the product of a

limited geographical region. No independent markets exist in which prices vary according to the adequacy or inadequacy of the supply accumulated in depots or warehouses at distributing points remote from the Pacific Coast when related to the demands of the district supplied by such depots or warehouses. The entire market is referable to the Pacific Coast market as a basis plus freight. (R. 175, *209,* 229.) In this connection it is to be noted that the contract price is fixed at 20c per pound *plus freight.*

Another legitimate method of showing the market price at Milwaukee would be by showing the market price in Chicago, a large metropolis close thereto, in which, at the time in question, many sales of large quantities of hops were made. Such evidence would not be for the purpose of predicating damages upon the price obtaining in the Chicago market but for the purpose of ascertaining the true Milwaukee market.

In *National Warehouse & S. Co. vs. Toomey, et al.* (Mo.) 129 S. W. 423, the court said:

> "But the damages are not necessarily measured by the market price at the place of delivery, for if there is no market for the article at the place of delivery, the market price *at the nearest and most available market* would determine the measure of damages."

We will briefly review all of the evidence of actual sales at Milwaukee, at Chicago (the nearby metropolis) and on the Pacific Coast where all hops of like quality

were grown and where the base market price was fixed.

It is of the utmost importance in reviewing the prices at which actual transfers occurred to understand the quality of hops specified by the contract. In the first place it is undisputed that all choice Pacific Coast hops, whether they were Consumnes, Mendocinos or Sonomas, were of substantially equal value and commanded the same market. (R. pp. 190, 194, 204, 234; bottom of R. p. 200.)

It is undisputed that *choice* hops, as specified in the contract, indicates the highest grade so that in reviewing sales made it must be borne in mind that such sales could not possibly have been of a better quality of hops than that specified in the contract, except that so-called "strictly choice" hops, the superlative grade, were about 1c higher. (R. p. 194.) Actual sales of Pacific Coast hops, therefore, in Milwaukee, Chicago or on the Coast, could not have involved hops of a more valuable quality than that specified in the contract.

SALES IN MILWAUKEE.

The witnesses to market value called on behalf of the plaintiff were, at most, three,—Mr. E. Clemens Horst, who testified to no sales at Milwaukee or even at Chicago or any other nearby point, and who testified as follows:

> "Q. You kept track of the entire market during November, 1912, did you?

A. Well, I kept track of the market, yes, but I don't know—I knew it at the time, *but I don't know now.*" (R. p. 62.)

In *United States vs. Baxter,* 46 Fed. 350, at page 351, where a witness had previously testified that he did not know the market value of the timber in question, and he was then asked about his best recollection as to what the price was, the court held:

> "To allow a witness to testify as to value of property, he should have some knowledge of the value of the same either from the market price or the selling price of the same. * * * *A man's recollection of value of property is a poor criterion to guide a jury in estimating damages.* A man's best recollection is a very indefinite matter. It might amount to so little as to be entirely worthless for any practical purposes, or to influence a business man in arriving at any reasonable conclusion in any business transaction. For these reasons I think it was error to allow the witness to answer the question asked."

Mr. Horst further testified that he commenced preparing for this action before he commenced even the picking of hops. (R. p. 67.) Such picking commenced August 12, 1912. (R. p. 102.)

The next witness for the plaintiff was F. W. George, an employee of the Horst Company, who helped in the preparation of its case, and a cousin of Hr. Horst's wife and an intimate friend of Mr. Horst. (R. p. 99.) This witness testified to no sale at Milwaukee or Chicago and

predicated his testimony solely upon a single sale of a comparatively small quantity of hops made by him for the Horst Company to the Narragansett Brewing Company, at Providence, in the State of Rhode Island. (R. pp. 97, 99.) (The Rhode Island residence of the purchaser is indicated at the bottom of R. p. 67.) This witness further testified:

> "Q. Mr. George, do you know of any sales *in or about Milwaukee* on November 4, or thereabouts, in 1912?
> A. No." (Bottom of R. p. 96.)

The final witness called by the plaintiff on this issue was Flood V. Flint, of Sacramento City, who testified:

> "The price in Milwaukee is based on the price here, plus freight." (R. p. 272.)

He further testified with reference to sales in November, 1912:

> "I don't know of any that were sold at that time in Milwaukee. I did not sell any in Milwaukee." (R. p. 273.)

His testimony was not predicated upon any sale whatever but upon offers made to growers on the Coast which were below the point at which sales could be induced. He testified as follows:

> "Q. Have you any recollection of any sales of Consumnes hops of purchases in the months of November and December, 1912?
> A. *I have not them in mind now; I cannot recall them.*
> Q. What do you base your estimate on, then?

A. I can recall that *we had offers of 12 cents*, and in the ordinary daily business we offered according to our instructions, but I cannot remember any distinct ones." (R. p. 274.)

Such is the essence of the Horst Company's testimony concerning sales at Milwaukee. Not one of its witnesses testified to a single sale, large or small, either in Milwaukee or Chicago. The opinion evidence of these witnesses as to the Milwaukee market was worthless because predicated upon no sales whatsoever in Milwaukee, Chicago or on the Pacific Coast. The witness Flood V. Flint, disregarding the fact that large quantities of Coast hops were actually sold in Milwaukee, Chicago and upon the Coast during November, 1912, expressly based his entirely worthless guess upon unaccepted offers made to growers in the Coast district.

Undisputed evidence offered by the Pabst Company showed a large number of sales covering substantial quantities at Milwaukee during the month of November. The Pabst Company, after refusing to permit the Horst Company to deliver hops no better in quality than the samples of hops which it proposed to deliver, purchased the following hops:

November 4, 1912, 332 bales Pacific Coast hops 22c less freight. (R. p. 174.)

November 14, 1912, 93 bales 22c delivered.

November 14, 1912, 89 bales 22c delivered.

November 21, 1912, 250 bales 22c delivered.

November 25, 1912, 100 bales 21c delivered.

November 25, 1912, 156 bales 23c delivered.

November 25, 1912, 100 bales 22c delivered.

December 24, 1912, 80 bales 23c delivered. (R. pp. 170, 171, 172.)

The total of these sales is large, amounting to 1,020 bales, and the average price substantially the same as the contract price. (Note—The 13 bales shown at record page 171 is a misprint as is indicated by the poundage and total purchase price.)

SALES AT CHICAGO.

Market value at Chicago is the same as at Milwaukee. (Testimony of Horst, R. p. 50.)

The Pabst Company offered the testimony of M. D. Wormser, vice-president of Falk-Wormser & Company, dealers in hops and brewers' supplies in Chicago, who sold from eight to ten thousand bales of hops in 1912. (R. p. 187.) This witness testified as follows:

> "I have been in business for fifteen years and am familiar with the market value of hops in Milwaukee. Milwaukee is eighty-five miles from Chicago. *The Chicago market for hops of the character of Consumnes is the same as the Milwaukee market.* I know the Consumnes hops grown in California. The reasonable market price in Milwaukee of strictly choice Consumnes hops on November 4th, 1912, or thereabouts, was from twenty-two to twenty-four cents a pound. (R. p. 186.)
>
> Consumnes, Russian River, Mendocino, Sonoma and American River hops *are the same general type,* and were about the same as Consumnes." (R. p. 190.)

Horst Company's counsel offered in evidence a letter written by Mr. M. N. Falk, evidently in response to an inquiry as to what the market price of hops had been during a certain period of years. That communication in part reads: (R. p. 189.)

> "I have taken pains to look up our records and herewith give you the following details which are bona fide. * * * According to our sales-book the selling price of *prime to choice* hops during:
>
> November, 1910, averages about 16c per pound.
> November, 1911, averages about 45c per pound.
> *November, 1912, averages about 23c per pound.*
> November, 1913, averages about 26c per pound.
> November, 1914, averages about 14c per pound.
>
> These figures are as nearly accurate as we can possibly give them to you. * * *"

Mark J. Murphy, called on behalf of the Pabst Company, testified as follows:

> "I am the office manager for Falk-Wormser & Company and have been for thirteen years. (R. p. 193.)
>
> *The market in Milwaukee for hops is the same as at Chicago.* There is no difference in the sale price of Pacific Coast hops in Milwaukee from Chicago. (R. p. 193.)
>
> I have been familiar with the market value of hops in Milwaukee and Chicago markets for thirteen years. (R. p. 193.)
>
> In looking over my books I note that year (1912), I think the price of Consumnes and Sonomas was about the same price. *I kept the records of what we bought and sold* and was familiar with the market of Consumnes hops and all hops of the character of Consumnes. (R. p. 194.)

The price between dealer and dealer and the price between dealer and brewer differed. There is an advance to the brewer generally. (R. p. 195.)

In the year 1912 our firm sold from ten to twelve thousand bales of hops. (R. p. 195.)

My firm sold 889 bales of Pacific Coast hops in November, 1912. I got these figures from my books. The delivery price ranges from eighteen cents a pound to twenty-five and one-fourth cents a pound. The twenty-five and one-fourth cent price is on one five bale lot. With that exception the highest price is twenty-four cents. (R. p. 199.)

With reference to the sales made by us in November, there was one lot which we sold at eighteen cents, that were not choice. (R. p. 200.) I know of my own knowledge that the 118 bales that were sold by my firm for eighteen cents a pound were not choice. I know this from the time of the purchase and the sample number that is referred to at the time. (R. p. 201.)

In November we sold choice hops as follows:

November 2nd, 15 bales at 24c.
November 6th, 10 bales at 22c.
November 7th, 25 bales at 22c.
November 8th, 244 bales at 22c.
November 10th, 10 bales at 22½c.
November 11th, 25 bales at 23c.
November 12th, 10 bales at 24c.
November 19th, 104 bales at 22c.
November 22d, 22 bales at 23c.
November 23d, 50 bales at 24c.
November 25th, 25 bales at 23c.
November 25th, 25 bales at 23½c.
November 26th, 25 bales at 25¼c.
November 27th, 15 bales at 23c.

(R. p. 200.)

Probably one-half of our hops are sold as Pacific Coast hops, and with reference to these Pacific

Coast hops, could be Consumnes, Mendocino or Sonomas. There would be no difference provided they were choice." (R. p. 200.)

G. G. Schumacher's deposition was taken by the Pabst Company, and he testified as follows:

"I am the secretary and treasurer of A. Magnus & Company, who are engaged at Chicago in the general brewer's supply business. I have been connected with this firm for thirty-five years and have bought and sold hops during that period. I am familiar with the market in Chicago and vicinity, including Milwaukee. *There is no difference in the market price of hops in Chicago and Milwaukee.* (R. p. 202.)

The market price of strictly choice Consumnes hops in Milwaukee on November 4th, 1912, and thereafter for the next few weeks was about twenty-three cents, and *for choice twenty-two cents.* There was a fairly active market at that time. I base the price of choice Consumnes hops on the price of choice Oregons and choice Sonomas. (R. p. 203.)

Consumnes were close to the price of Oregons and Sonomas in 1912. The Pacific Coast hops during that month were selling from twenty-two and one-half cents to twenty-four cents. I am testifying both on the basis of my sales and the reports of the 'Brewer's Daily Bulletin.' The highest price that I secured for any Pacific Coast hops during that time was twenty-four and one-half cents, and the lowest price of *choice hops* during that month was twenty-two and one-half cents. (R. p. 204.)

We sell from eight to ten thousand bales a year. The season is short. It opens up in October and about February or March it is about over with." (R. p. 205.)

It will therefore be observed that the witnesses' knowledge of market value was predicated *upon actual sales* made in the month of November, 1912. The Chicago transactions detailed by these witnesses demonstrate that the prices hereinbefore set forth and which were recognized in the actual sales at Milwaukee in November, 1912, coincided with the true market price.

Upon the taking by the Pabst Company of the deposition of Rudolph Keitel there were offered in evidence extracts showing market quotations in November, 1912, on Pacific Coast hops from the "Brewer's Daily Bulletin," of which the witness was the editor and publisher.

This witness testified as follows:

> "We got the information concerning hops that appeared in the bulletin from the brewers who are the consumers of hops and the dealers in hops. During 1912 it was *a daily publication.* The circulation covers the brewers and the allied trades in the United States from coast to coast. The statements contained in my paper are accepted by the trade as facts. The statements were truthful statements. (R. p. 210.)
>
> We never at any time during the month of November, 1912, had any person connected with the trade inform us that any figures given by us were incorrect. (R. p. 212.)
>
> When we go around to these hop men to get information they show us telegrams and letters from the Pacific Coast, and from that stuff we compile the gossipy part of the hop market report just as carefully and just as accurately as the remainder of it. (R. p. 220.)

The prices set forth in our paper were the prices a man reasonably desirous of buying would pay to a man reasonably desirous of selling. (R. p. 224.)

There are many transactions of which I naturally knew about.

Q. Were these transactions used in your paper or not?

A. They were reflected in the quotations, naturally. *I have been present at times when the transactions have taken place.* I have seen contracts signed—have seen telegrams of confirmation, but I cannot say whether they took place in any one of these particular days. That is a long time ago, but I mean that in my course of business I see these things. (R. p. 227.)

If there was no demand for several days or a brewer comes along and says: 'I will buy for a cent less,' or if the market begins to change because of some sale or because of the lowering in the asking price, or something like that, then I change my quotations in my papers, and *in that way the data published in the Brewer's Bulletin* was based upon the information obtained from transactions, although there may have been no sale on that particular day. (R. p. 228.)

The circulation of my paper has increased all the time."

That these market reports contained in the "Brewer's Daily Bulletin" were considered reliable by the trade whose acts were governed by the accuracy of its quotations, is to be noted from what the large dealers and brewers generally thought of these publications.

W. D. Wormser testified:

"I am familiar with the various trade journals which were current in November, 1912. The prices

that were quoted in these papers for hops were accepted by the trade in Chicago and vicinity, including Milwaukee, as the current market price of hops. *They were authentic and accepted by the trade as reliable.* (R. p. 187.)

They gave their prices based on facts. (R. p. 191.)

The brewers and salesmen of hops referred to those trade journals for current prices, and the prices in those journals are accepted by brewers as being approximately correct." (R. p. 192.)

Mark J. Murphy testified:

"I am familiar with the trade journal known as the 'Brewer's Daily Bulletin.' It is generally relied upon and the prices quoted in that paper are generally accepted by the trade as being accurate and correct. I have found the quotations given in that paper reliable and they are generally so regarded by the trade and the prices therein quoted were accepted in 1912 by people buying and selling hops as being reliable quotations, generally speaking. (R. p. 194, 195.)

The journals secure their information and publish the range of prices, whatever it was, as an interpretation of the facts which were reported to them by the dealer. (R. p. 197.)

I keep track of the records in the prices of this daily trade journal in my business and the *information therein contained* is correct with reference to the matters that I know of myself. *In the month of November, 1912, the transactions that I knew about that were therein reported were correct.* They quoted the prices that we gave them. They took the prices that we gave them, confirmed it by other dealers and correctly recorded the prices which they got from us and other dealers. (R. p. 198.)

When I said the paper interpreted the prices I meant they took the prices from one dealer and confirmed it by the other hop dealers." (R. p. 198.)

G. G. Schumacher testified:

"I have furnished information to that paper ('Daily Brewer's Bulletin') almost daily, and I subsequently check over the records made by that paper as to the information given them by me by means of reading the bulletin. They not only publish the information we gave them but the information they get from others. The information as I gave it to them *came out accurate as to the prices quoted* and the trade usually accepted the figures as given them by this paper as being accurate." (R. p. 203.)

Charles Zaumeyer, the hop buyer for the Pabst Company for twenty-two years, also placed reliance upon market reports in arriving at his opinion on market values. (R. p. 179.)

Horst Company's witness, F. W. George, testified that although he regarded prices given by market reports as unreliable, he kept abreast of the market quotations and read the "Brewer's Bulletin" under hops and was familiar at the time with the quotations contained therein. (R. p. 98.)

MARKET REPORTS AS EVIDENCE.

It is a rule recognized generally that market reports or quotations as contained in newspapers, trade jour-

nals, trade circulars and price lists are competent evidence of the state of the market.

Cliquot's Champagne, 3 Wall. (U. S.) 114, 18 (U. S. L. ed.) 116;
Vogt vs. Cope, 66 Calif. 31;
Hudson vs. N. Pac. Rd. Co. (Ia.) 60 N. W. 608;
Sisson vs. Cleveland, etc., Rd. Co., 14 Mich. 489, 90 American Dec. 252;
American & English Ann. Cases, Vol. 12, page 127.

In *Sisson vs. Cleveland, etc., Rd. Co., supra,* a case extensively quoted, Judge Cooley, in speaking of market reports contained in newspapers, said:

> "As a matter of fact, such reports, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries or individual sales or inquiries; and courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character."

Portions of the Brewer's Bulletin referring to the price of Pacific Coast hops and published on November 4th, 7th, 12th, 14th, 18th, 23rd and 27th, were read into the evidence by the Pabst Company in connection with the deposition of Rudolph Keitel. The quotations on

Pacific Coast hops on November 4th, 1912, reported by said Bulletin, were as follows (R. p. 211):

"1912 Pacific Coast Hops—

Oregons, strictly choice, free of mould..23 at 24c
Yakimas, strictly choice.....24 at 25c
Mendocinos, strictly choice.....22 at 23c
Russian Rivers, strictly choice.....22 at 23c
Sonomas, strictly choice.....23 at 24c
Pacifics, medium to prime.....20 at 21c
Pacifics, lower grade, poor quality, mouldy .....18 at 19c"

In all of the other published quotations read into the record at pages 213, 214, 215, 216, 217, 218, 221 and 222 the lowest prices of choice Pacific Coast hops quoted at the respective dates there indicated is in no single instance under the price stipulated by the contract in suit. We have quite exhaustively analyzed the evidence as to the Chicago market based upon actual transactions and upon reliable market reports, and in every respect the transactions at Milwaukee have been corroborated.

The trial court found in its sixth finding of fact (R. p. 20) that the hops in question had a market price in Milwaukee on November 4th, 1912. We submit that under the former opinion of this court the market price then prevailing based upon undisputed actual transactions in Milwaukee, must control. If the Milwaukee market price is to be determined by sales elsewhere, the law requires that we resort to *the nearest available and controlling market*. We have now shown that the Chicago market, like the Milwaukee market, exceeded

the contract price. No other market can possibly be used for measuring damages unless it be the base market on the Coast where hops of the character in question were grown and assorted and whence they were shipped and distributed.

SALES ON THE PACIFIC COAST.

E. Clemens Horst testified, viz.: (R. p. 58.)

> "I bought a special lot of hops from Wolf, Netter & Company, about 100 bales of Consumnes in November, 1912, *at seventeen cents per pound. I do not know of any sales of Consumnes hops outside of this one sale to us,* and the hops that I sold of my own crop. (R. p. 61, 62.)
>
> When I sold hops after November, 1912, for fourteen to seventeen cents, I knew Pabst sale was off." (R. p. 62.)

Irving S. Marks, a commission dealer in hops for twenty years, buying and selling in the Sacramento market and all sections of California, testified as follows:

> "I was familiar with the Sacramento hop market in 1912. In November the price was eighteen to nineteen cents f. o. b. Sacramento and *in order to get the price to a brewer in Milwaukee you would have to add the freight and buying and selling commission.* On November 4th, 1912, the market price of choice Consumnes hops in Milwaukee would be twenty-two to twenty-three cents. (R. p. 174-175.)
>
> The market was pretty firm in November, 1912, for choice variety. I took deliveries of some choice Consumnes hops that we bought at eighteen and one-half cents. Mr. Spicer got them from the

Jacks people—*about three hundred bales.* (R. p. 177.)

I saw another lot of choice Consumnes hops bought in Sacramento about that time at nineteen cents a pound. (R. p. 178.)

Otto Koch, a farmer and hop dealer, in business for the last five or ten years in buying and selling hops on commission, testified:

"I dealt in hops all over the Sacramento section, Yolos, Consumnes, Wheatland and all kinds of California hops in the Sacramento market in the year 1912. (R. p. 183.)

I bought some choice Consumnes hops about November 4th, 1912, for nineteen cents a pound, and the market value at that time was nineteen cents a pound. I bought them for George Proctor, for Lilienthal, Faulk-Wormser & Company, E. Magnus Company. The price to the growers was from seventeen and one-half cents to nineteen cents a pound. (R. p. 183.)

I got an order to buy, in November, 1912, I think it was, 200 bales. The dealer's orders were to buy at certain figures in November. The lowest was seventeen and one-half cents, *but the only transaction I closed was for nineteen cents.* During that month I bought over 1,100 bales of hops. In November and December, 1912, the price paid for them ranged from seventeen and one-half cents to eighteen cents and even nineteen cents a pound." (R. p. 184.)

John M. Spicer, with his principal place of business in Sacramento, was engaged in the hop buying business since 1890, and testified as follows:

"I was familiar with the price of choice Consumnes hops in the Sacramento market on November 4th, 1912, or thereabouts. *I bought three lots of hops at that time at eighteen cents. The market price at that time was seventeen and five-eighths cents to eighteen and one-half cents to the grower.*" (R. p. 184.)

P. C. Drescher, a merchant in the wholesale grocery line, was also engaged in the hop business for some forty odd years and had his headquarters at Sacramento. This witness testified:

"I am familiar with Consumnes hops ever since they were grown on the Consumnes River. I was familiar with the market for choice Consumnes hops in Milwaukee in November, 1912. (R. p. 228.)

The markets of the country are relative. The difference of the freight and transportation is practically the difference between the market prices. (R. p. 229.)

The market value of choice Consumnes hops on November 4th, 1912, or thereabouts, I would say *was about twenty cents.* (R. p. 229.)

There was a demand on the market for the best class of hops. I did not hear of any choice Consumnes hops selling for fourteen and one-half cents or fifteen cents. *I know of sales about that time.* In November certain Wheatlands were sold. Choice Consumnes ran somewhat better than choice Wheatlands. *The choice Wheatlands were selling at that time at nineteen cents f. o. b. Sacramento.* (R. p. 233.)

November sales were on inquiries made at that time and the sale made at the time of delivery, and they were not previously contracted for. (R. p. 234.)

Choice Consumnes ran on about a par with choice Sonomas." (R. p. 234.)

C. C. Sweeney bought about seven or eight hundred bales of Consumnes hops in the Sacramento market. (R. p. 126.)

E. Clemens Horst testified that he afterwards heard of the sale from Wolf, Netter & Company to Sweeney, at Sacramento, in November, 1912, at eighteen and three-fourths cents per pound, but he asserted that a commission of one-half to three-fourths cents a pound was paid in connection with this deal. (R. p. 62.) Even were this true, so that one-half to three-fourths of a cent must be deducted from the price of eighteen and three-fourths in order to arrive at the grower's price, these hops were bought by a dealer f. o. b. the Pacific Coast, and the dealer's profit must be added in order to arrive at the price, exclusive of freight, that the brewer or consumer in Milwaukee would have been required to pay on the basis of this sale.

The testimony introduced in the trial court by the Pabst Company in support of its defense meets every requirement of the rules of evidence as to market value. Actual sales and hop transactions were first shown in Milwaukee on the very day designated in the former opinion of this court as the date of delivery. These were sales of large quantities and were followed by sales at similar prices during the month. Next, to meet the possible contingency that the court would not find as it

did in fact that a market existed in Milwaukee, the Pabst Company showed, by undisputed evidence, the prices controlling all sales, of which any record could be obtained at Chicago, the next nearest available place where there was an actual market. Chicago sales confirm the accuracy of the prices recognized by the Milwaukee transactions. Lastly, the base market for Pacific Coast hops was appealed to. The current price shown to have been received by the grower in that market at the time in question for the quality of hops contracted for, again demonstrates beyond peradventure (when allowance is made for freight and the intermediary commissions between grower and consumer), the genuineness of the price controlling actual transactions in Milwaukee.

The opinion of this court which became the law of the case by which the trial court should have been guided, based upon the long established precedents, only reiterates the rule as to where and when market value must be determined.

MARKET VALUE.

> "The market price *must be determined as of the place of delivery,* provided the goods have a market price at such place. If there is no market price at the place of delivery, the true value is to be shown by the best evidence possible, and in such cases the market price at other places, plus the expense of transportation to the place of delivery, may be used as a basis for computation; *and if the market price in the vicinity of the place of delivery is shown*

to depend on the market price at a large, well-known and active market, the market price at such place, plus transportation charges, must be considered."

35 Cyc., Sales, page 638;
National Warehouse & S. Co. vs. Toomey, et al. (Mo.), 129 S. W. 423;
Ebenreiter vs. Dahlman, 42 N. Y. S. 867, 871;
LaRue vs. St. A. & D. Elevator Co. (So. Dak.) 95 N. W. 292;
E. Tennessee & G. Ry. Co. vs. Hall (Ga.), 1 S. W. 620;
Western Assocn. vs. Studebaker (Ind.), 23 N. E. 1139;
Wigmore Evidence, Vol. I, Sec. 717;
Gray vs. MacDowell, 8 Wendall, 435;
2 Sutherland, Damages, 3rd Ed., Sec. 445, p. 1213;
Lincoln vs. Alshuler Mfg Co., 142 Wis. 475.

The contract was consummated by acceptance in Wisconsin and was to be performed in Wisconsin by delivery f. o. b. Milwaukee. The damages, therefore, are to be measured according to Wisconsin law.

17 Corpus Juris, damages, 719;
L. J. Mueller Furnace Co. vs. Meiklejohn, 121 Wis. 605;
State ex rel. News Pub. Co. vs. Park, 166 Wis. 386.

In the *Lincoln vs. Alshuler Mfg Co.* case *supra,* the court said, at page 484:

> "The measure of damages, by the ordinary rule, is the difference between the amount (the vendee) agreed to pay for the goods *and the reasonable market value thereof at the agreed delivery point in Wisconsin at the time of the breach.* * * * That is subject to the exception that when there is no fair market value at the delivery point, such value may be determined at some other point just to both parties. * * *"

In *Birdsong & Co. vs. Marty,* 163 Wis. 516, the court held:

> *"Market price is not an imaginary, fictitious thing, but is the price at which goods are actually being sold in the market at the time or times in question."*

Market values are therefore only to be predicated upon actual transactions. When a person in a certain locality offers a commodity for sale at a price at which other parties, desirous of acquiring ownership in that property, are willing to pay, a sale necessarily follows. That proves the soundness of the principle that market value is not an imaginary or fictitious thing, for when prices quoted by willing sellers and the offers of persons ready to buy coincide, the result is a sale. Offers to sell or buy, not reciprocally attractive, must necessarily be unproductive of results. Evidence of a buyer's offer not resulting in a sale is not competent proof of market value. We must deal with actual transactions, not with

transactions which might have occurred if the seller had been of a different frame of mind. The witness Otto Koch testified (R. p. 183) that he had orders from dealers to buy at 17½c but that the only transaction which he closed was at 19c.

The preliminary demands of the sellers were doubtless as much above 19c as the offer of the buyers were below 19c. The 19c figure was the meeting ground at which the transfer occurred.

The witness, Flood V. Flint, testified to no transactions whatever but to mere unaccepted offers. (R. p. 273.) Such testimony is incompetent, is no evidence of market value and is particularly worthless when compared with complete and undisputed proof of the prices at which many sales of substantial quantities were actually made at the time and place in question.

Cobb vs. Whitsett, 51 Mo. App. 145;
Hammond vs. Decker (Tex.), 102 S. W. 453;
Goldstein vs. Arkell, 164 N. Y. S. 580;
Saxe vs. Penoke Lbr. Co. (N. Y.), 54 N. E. 14;
Sharp vs. U. S., 191 U. S. 341, 348.

The Horst Company was permitted over the Pabst Company's objection to introduce opinion evidence that throwing the quantity of hops specified in the contract upon the market would depress the market. This testimony was not competent

13 Cyc. on Evidence, 510.

Dana vs. Fiedler, 12 N. Y. 40; s. c. 62 Am. Dec. 130, in which the third headnote is, in part, as follows:

> "* * * conjectural opinions of witnesses as to the probable effect of putting upon the market the quantity called for in a particular contract, in addition to the usual supply, can not be received."

Upon well-settled principles of law reiterated in the former opinion of this court the measure of damages is the difference between the contract price and the market value at the time and place of delivery.

The place of delivery was Milwaukee and the time of delivery, as fixed by the former opinion, November 4, 1912.

The Horst Company produced no evidence of any sales at either Milwaukee, Chicago or on the Pacific Coast, except a single sale of 100 bales purchased by Horst from Sacramento dealers at 17c per pound. (R. p. 58.)

The undisputed evidence shows a number of sales of large quantities at Milwaukee during November at prices ranging from a cent below to a cent above the contract price.

Similarly, the evidence shows, without dispute, many transactions at Chicago involving transfers of large quantities of hops at prices identical with those obtaining in Milwaukee.

Finally, the base market on the Pacific Coast is found to be comparable with both Milwaukee and Chicago markets.

The court's finding that the market price at the time and place of delivery was 6c below the contract price of 20c determines the market price to be, at the time and place of delivery, only 14c per pound, exclusive of freight. This finding shows that the trial court excluded from its consideration the prices which, by the undisputed evidence, controlled actual market activities in both Chicago and Milwaukee. The finding of the court is diametrically opposed to the undisputed evidence of actual current prices. It follows that the trial court must have regarded such prime evidence as not pertinent and must have predicated its finding of market price upon (a) sales of small quantities of hops claimed to have been made by Horst at points remote from Milwaukee, concerning which this court said:

> "Furthermore, the market value or price at Milwaukee, the place of delivery, was the criterion, and *these sales were made in many different states,* and even in the Dominion of Canada. For these reasons the testimony offered was incompetent and irrelevant, and should have been excluded." (229 Fed. Rep. 919.)

or (b) the incompetent opinion evidence as to the depressing effect of throwing upon the Milwaukee market the quantity of hops specified in the contract.

A review of the testimony of Horst Company's three witnesses, E. Clemens Horst, F. W. George and Flood V. Flint, discloses no other possible basis for the court's finding of market price of 14c per pound. The witness Paul E. Peterson called by the Horst Company testi-

fied that he sold his hops in 1912 for 22c. (R. p. 115.) Certainly, Peterson's testimony affords no basis for the court's finding.

SECOND.

The finding that the Horst Company was able and willing to deliver the contract quantity (2,000 bales) of choice Consumnes hops is not supported by competent evidence.

This court, in its former opinion, held:

> "The books themselves afforded the primary evidence of their contents, and as long as they were accessible and unaccounted for, any evidence as to what they contained or showed was secondary and incompetent. This rule is elementary. Furthermore, the books were not identified or proved, so as to render them competent, if offered. It appears from the compilations referred to that the books recorded transactions which took place in New York, Chicago and various other places throughout the United States, and there was not the slightest testimony as to how the books were kept, by whom they were kept, when the entries were made, or the sources from which they were made."

The ability of the Horst Company to perform the contract was one of the issues. (229 Fed. Rep. 917.)

St. Louis & S. F. Ry. Co. vs. Herr, 193 Fed. 950.

The total quantity of hops grown by the Horst Company in 1912, of the contract quality, was 4,350 bales. (Bottom of R. p. 45.)

The amount sold prior to November 4, 1912, was 2,764 bales. (R. p. 156.) (Testimony of T. A. Farrel.)

The testimony of the Horst Company shows that subsequent to November 4, 1912, it sold only 1,503 bales, exclusive of pickouts, replacements and cutups. (R. pp. 72, 73, 74.)

The testimony upon which the court evidently based its finding is the general statement of Horst, predicated upon the contents of books which were not kept by him as to the quantity of hops which the Horst Company possessed available for delivery on or subsequent to November 4, 1912.

On the first trial the testimony of this witness was predicated upon a recollection of his books. This method of presenting facts derived from books without presenting or accounting for the books or producing the witness who made the entries was condemned by the former opinion.

The books were not produced at the last trial. General statements of the witness Horst, as to the ability of the Horst Company to make delivery, were admitted by him to be predicated upon his review of his previous printed testimony which, in turn, was predicated upon unproduced books. (R. p. 80.)

In *Campbell vs. Rice,* 22 Cal. App. 734, 736, the court said:

> "We are referred to no authority and we know of none holding that a party to an action may copy a book of original entries in his possession withholding the original and prove his case by introducing such copy in evidence, while on the contrary numerous authorities hold such ruling to be error."

See, also, *People vs. Whalen,* 154 Cal. 472, 474.

The testimony of Farrel stands upon a somewhat different ground, being in the nature of an admission on the part of the Horst Company.

The testimony of the witness Horst at the last trial was contrary on important points to his testimony on the first trial. Accordingly his entire testimony should be given little weight. At the last trial he testified as follows:

> "We subsequently sent the defendant other samples Nos. 25 to 38. These samples compared with the samples 1 to 20 were the same general type and the same grade of hops. One of these samples is a part of a sample defendant sent to us. The sample was exactly like another sample that I had already sent them, which they had rejected, so as to have no question in my mind that they proposed to reject everything, *I sent them back one of the samples. I put it in a different package and sent it to them."* (R. pp. 48, 49.)

On the former trial this witness testified:

> "I took the four and matched up those hops identically so that nobody on God's earth could tell the difference, and I sent them such a line of samples, and they even rejected those very samples. The Pabst people informed Mr. Gerber that I sent back the identical sample, but I did not." (R. pp. 55, 56.)

CONCLUSION.

This action has been twice tried and, if possible, the litigation should now be terminated.

The record of the last trial shows that the judgment is grounded upon evidence held by the former opinion to be incompetent.

It is also demonstrable that if the trial court had measured the damages of the Horst Company by the market value of hops at the time and place of delivery, in accordance with the direction of the former opinion of this court, it would have necessarily found that the market price at such time and place was no lower than the contract price. Such finding would have called for judgment of dismissal.

The two successive judgments which have been entered in this action have resulted from a disregard of the plainest rules of law in respect to the character of evidence by which market value at the time and place of delivery is to be determined. The judgment now before this court is hostile to all of the competent evidence on the question of market value. Any attempt to de-

fend such judgment by resorting to the opinion evidence of witnesses who admit their lack of knowledge of the prices controlling actual sales on the pertinent markets, or, by resorting to evidence of the small sales made by the Horst Company at remote points near the Atlantic Coast, which evidence was condemned by the former opinion, must fail.

The Pabst Company has not been accorded a trial upon the evidence. Such evidence discloses no legitimate basis for the court's finding that the market price at Milwaukee on November 4, 1912, was 6c under the contract price of 20c per pound, exclusive of freight. (Finding VII, R. p. 20.) All actual sales in every market proper to be considered show the market price to have equaled or exceeded the contract price. The amount of damages found by the court results from applying a 6c per pound difference to the total weight of the bales, as set forth in Findings III and V. (R. pp. 18 and 20.)

The Pabst Company seeks only the vindication of its fundamental rights. It seeks to have this controversy decided upon competent evidence particularly as the competent evidence is most convincing of the true market value. The competent evidence is undisputed and will support only one finding. This court should, by its mandate, order the proper finding to be entered and the litigation ended.

The power to reverse includes the power to modify.

Nothing can be gained by a new trial. The record

contains a full and undisputed showing of the prices at which actual sales of hops occurred in pertinent markets. Market price is fixed by such actual sales.

The mandate of this court should fix the true market price established by the competent evidence and direct the entry of judgment accordingly.

Respectfully submitted,

Frank H. Powers.

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Of Counsel.

No. 3427

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PABST BREWING COMPANY,
a Corporation,
Plaintiff in Error

vs

E. CLEMENS HORST COMPANY,
a Corporation,
Defendant in Error.

Reply of Defendant in Error to Oral Argument of Henry W. Stark and Frank H. Powers for Plaintiff in Error

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ANDERSON PRINTING CO. SACRAMENTO, CALIF.

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PABST BREWING COMPANY,
a Corporation,
Plaintiff in Error

vs

E. CLEMENS HORST COMPANY,
a Corporation,
Defendant in Error.

REPLY OF DEFENDANT IN ERROR TO ORAL ARGUMENT OF HENRY W. STARK AND FRANK H. POWERS FOR PLAINTIFF IN ERROR.

Permission was given to the counsel for plaintiff in error to print their oral argument and permission was given us to reply. In reply to their oral argument we submit:

I.

In our brief filed prior to the oral argument we showed that the plaintiff in error did not present any finding to the Court below nor ask the Court to adjudge that the evidence was insufficient to support any finding and that it did not secure any ruling

thereon nor take any exception to any ruling or finding. We called the attention of the Court to some of the cases showing the rule to be universal in the Federal Courts that under such circumstances the Appellate Court cannot review a finding. The Courts are forbidden by the Act of Congress to do this.

Among other cases, we cited one from this Court where this principle was applied.

> *Danberg Land & Livestock Co.* v. *Day*, 247 Fed. 477.

In that case the opinion was rendered by Mr. Justice Gilbert who said:

> "At the close of the testimony there was no request by the plaintiff in error for a finding in its favor on the issues and by no motion or request did it present to the trial Court the question of law whether there was substantial evidence to sustain findings for the defendant. The sufficiency of the evidence to support the findings, therefore, is not open to review in this Court."

> *Danberg Etc. Co.* v. *Day*, 247 Fed. 477.

Among the cases cited by this Court is *Dunsmuir* v. *Scott*, 217 Fed. 200, where it was said:

> "The question whether or not at the close of the trial, there is substantial evidence to sustain a finding in favor of one of the parties to the action is a question of law which arises in the progress of the trial. Where the trial is before a jury that question is reviewable on exception to a ruling upon a request for a peremp-

ber, 1912, at Eastern prices where the market price was the same as at Milwaukee as established by the evidence at prices that ranged from 14½ cents per pound to 18 cents per pound. (Record pp. 67-68.) The average of these market prices was 15.7 cents per pound.

(c) *By inferences from undisputed facts.*

It was established by evidence that Oregon hops are better or at least as good as Cosumnes hops and that Oregon hops sell for a greater price or at least for as great a price as Cosumnes hops.

M. D. Wormser one of witnesses for plaintiff in error says that the relative price of Oregon hops and Cosumnes hops was about the same. (Record p. 190.)

Another witness G. G. Schumacher testified that Sonoma hops sold higher than Cosumnes and that Sonomas ranked with Oregons. (Record p. 209.)

Another witness Murphy testified that Cosumnes are usually a cent below Sonomas or about the same. (Record p. 194.)

E. C. Horst says that Oregons and Sonomas are a higher grade than Cosumnes. (Record p. 108.)

If Oregon hops are a better grade than Cosumnes hops, or at least of an equal grade, and sell at a better price, or at least at an equal price, it is evident if we can know the price of Oregon hops at any given time and place we will know approximately the price of Cosumnes hops at such time and place or at least will know that the price for Cosumnes hops is no higher than that of Oregon hops.

It was uncontroverted that the price of choice

Oregon hops in November, 1912, was ten to twelve cents a pound and purchases were made at those prices. (Record p. 88.)

It follows therefore, as a conclusion that the price of Cosumnes hops cannot be greater than the price found by the Court, that is: 16 cents a pound at Milwaukee.

III.

With reference to the ability of the defendant in error to deliver 2000 bales of hops the evidence is ample.

E. C. Horst who was the active manager of the company defendant in error, and familiar with his own business testified that on November 4, 1912, the company had on hand over 3000 bales and gave their location. (Record p. 99, p. 78, pp. 80-81, p. 55.)

He certainly had the knowledge of his own affairs. He testified of his own knowledge.

Of the hops that the defendant in error had on hand 1586 bales were on the Pacific Coast. Other hops making a total of 3062 bales were in Eastern warehouses consigned to the defendant in error and in his possession and control. The plaintiff in error could have had any time its contracted 2000 bales out of these 3000 odd bales. (Record pp. 79, 84, 86.)

Witness Ernest Lange testified that in November, 1912, the defendant in error had 3062 bales of Cosumnes hops on hand. His testimony is:

> "Some were on the Cosumnes ranch, some were in Chicago, some at New York, some were en route East and some at Milwaukee. In Milwau-

tory instruction for a verdict. Where the trial is before the Court, it is reviewable upon a motion which presents that issue of law to the Court for its determination at or before the end of the trial. In the case at bar there was no such motion and no request for a special finding. We are limited, therefore, to a review of the rulings of the Court to which exceptions were reserved during the progress of the trial."

Dunsmuir v. *Scott,* 217 Fed. 200.

In another case decided in this Court, it is said by Judge Gilbert:

"The burden of the argument of counsel for the plaintiff in error is that the evidence overwhelmingly established the fact that Irwin was not a steel man, as he was classified in the policy, and as alleged in the complaint, but was a common laborer, and it ignores the effect of the judgment of the Court below, which must be taken as conclusively establishing the contrary, for there was no motion in the Court below for a ruling or judgment on that question at the close of the trial, nor does any assignment of error challenge the findings of the Court on the evidence. When an action is tried before a jury, their verdict is not subject to review unless there is absence of substantial evidence to sustain it, and even then it is not reviewable, unless a request has been made for peremptory instruction, and an exception is taken to the ruling of the Court. When a jury is waived and the cause is tried by the Court, the general finding of the Court for one or the other of the parties stands as the verdict of a jury, and may not be reviewed in Appellate Court, unless the lack of evidence to sustain the finding has been suggested by a request for a ruling therein, or a motion for judgment, or some motion to present to the Court the

issue of law so involved before the close of the trial."

Pennsylvania Casualty Co. v. *Whitemay,* 210 Fed. 782 citing numerous cases.

It would be useless to multiply these authorities.

Plaintiff in error asks the Court to reverse its decisions and to disregard the decisions of other Federal Appellate Courts. In support of this request, its counsel call attention to certain cases which have no application.

This is not a case where something was done in the Court below and there was a failure to record an exception. The act to which an exception might have been taken was not done at all. The rule announced by the Courts has no exception.

II.

The finding of the Court as to the difference between the market price and the contract price is sustained:

(a) *By the testimony of experts.*

Witness E. C. Horst testified that the market value of choice Cosumnes hops in Milwaukee in November, 1912, was 12 cents per pound. (Record pp. 49-50.)

F. W. George testified that the market value was 15½ cents to 16 cents per pound. (Record p. 94.)

Flood V. Flint testified that the market price was about 14 cents. (Record p. 272.)

(b) *By sales.*

Actual sales of these hops were made in Novem-

> kee they were at Merchants Storage and Transfers Company's Warehouse. In New York they were at the North River warehouse and the Terminal warehouse. Generally hops of that sort were sent to the order of E. Clemens Horst Company or notify E. Clemens Horst Company. Those in Chicago were at Sibley's Warehouse." (Record p. 117.)

The plaintiff in error criticizes the testimony of Mr. Horst. Such criticism was a matter to be addressed solely to the Court below. But if Mr. Horst's evidence were entirely eliminated the finding is supported by the evidence of Mr. Lange.

It is useless to argue which party below had the most evidence or the preponderance of evidence, on any certain issue because as said by Judge Ross where certain allegations were negatived by the trial Court:

> "Under the well established rule such findings are conclusive upon us, however, convincing we might otherwise consider the argument of the plaintiff in error that upon the evidence such findings should have been otherwise."
>
> "*National Surety Co.* v. *Globe Grain and Milling Co.* 256 Fed. 602.

The judgment should be affirmed.

Respectfully submitted,

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No. 3427.

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Brief for Defendant in Error, E. Clemens Horst Company.

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BRIEF OF DEFENDANT IN ERROR

This is a common law action to recover damages for the breach of a contract for the sale of two thousand bales of hops. This is the second time that this case has been before this Court for review. The first trial was had before a jury and a verdict was returned in favor of the plaintiff. This Court reversed the judgment for certain errors in the admission and exclusion of evidence. In the second trial a jury was waived and the case was tried before the Court without a jury. The second trial was conducted in accordance with the rules laid down by this Court and the errors for which the judgment was reversed were

avoided. All points decided on the former appeal become the law of the case.

> *Pabst Brewing Co.* v. *E. Clemens Horst Co.*, 229 Fed. 913.

In the second trial the Court found that the plaintiff below agreed to sell to the defendant and the defendant to buy two thousand (2000) bales of choice air dried Cosumnes hops of the 1912 year crop for the price of twenty cents per pound plus freight to Chicago, which freight was two cents per pound; that the plaintiff tendered the hops; the defendant rejected them and on November 4, 1912, notified the plaintiff in writing that it cancelled and repudiated the contract; that the hops tendered were of the character contracted for; that plaintiff was ready, able and willing to deliver the quantity of hops of the quality specified in accordance with the terms of the contract; that the total amount of hops contracted for was 370,000 pounds; that the hops had a market price at Milwaukee on November 4, 1912; that the difference between the contract price and the market price of the hops at Milwaukee, Wisconsin, on November 4, 1912—the date that defendant refused to accept the hops—was six cents per pound.

No findings were requested by the plaintiff in error (the defendant below) and plaintiff in error did not present any findings to the Court and did not before the close of the trial or at any time ask the Court to adjudge that the evidence was insufficient

to support any finding and did not secure any ruling thereon and consequently took no exception to any ruling.

The plaintiff in error in its brief claims that the evidence is insufficient to sustain these two findings, to-wit: (1) the finding that the market value of the hops was six cents per pound below the contract price at the time of the repudiation of the contract and place of delivery and (2) the finding that the defendant in error was ready, able and willing to deliver hops of the quantity and quality specified in the contract. It complains of certain rulings which it says relate only to evidence affecting these two findings.

The plaintiff in error reargues the questions of fact embraced in these two findings and asks this Court to retry the case on the evidence submitted, to make itself a finding and to order that finding to be entered and the litigation ended. It says that nothing can be gained by a new trial, that the power to reverse includes the power to modify, and that this Court, upon conflicting evidence in an action at law, can direct the entry of a judgment contrary to that rendered by the Court below.

I.

FINDINGS OF FACT CANNOT BE REVIEWED

The two findings attacked are findings of fact and they cannot be attacked for insufficiency of evidence to support them for the reason that no findings were

requested by plaintiff in error nor did the plaintiff in error present any finding to the Court nor ask the Court to adjudge that the evidence was insufficient to support any finding and it did not secure any ruling thereon nor take any exception to any ruling or finding.

A finding of fact contrary to the weight of the evidence is an error of fact and where an action at law is tried without a jury by a federal court and it makes a general finding or a special finding of facts the Appellate Court is forbidden by the Act of Congress to reverse that finding or the judgment thereon.

> *Wear* v. *Imperial Window Glass Co.*, 224 Fed. 60. Revised Statutes Sec. 1011; U. S. Comp. Stat. 1913, Sec. 1672, p. 700.

The language of Circuit Judge Sanborn in the case just cited is peculiarly applicable to the case before the Court. In rendering the opinion of the Court he says:

> "This case was argued and submitted on the supposition that there were exceptions to rulings of the court below upon questions of law and an assignment of errors which presented some legal question to this court for review but a reading of the record and the briefs subsequently disclosed the fact that it was a mistake. The only question the specifications of error attempt to present is whether or not the evidence which is conflicting sustains the finding and the judgment of the court. They invite this court in other words, to retry the case, and to determine whether or not under the applicable law the weight of the evidence sustains the finding and

judgment. But the case was tried by the court below without a jury, and its decision of that issue is not reviewable in this court. It is like the verdict of a jury assailable only in the ground that there was no substantial evidence in support of it, and then *it is reviewable only when a request has been made to the trial court before the close of the trial to adjudge on the specific ground that there was no substantial evidence to sustain any other conclusion, either all the issues or some specific issue in favor of the requesting party.* No such request was made in this case, and the specifications of error, therefore, present no question reviewable by this court."

Wear v. *Imperial Window Glass Co.,* 224 Fed. 63.

When the question is raised in the Appellate Court that there is no substantial evidence to sustain a finding, such finding is reviewable only, as in trial by jury, when a request, or a motion has been made, denied, and excepted to, or some other like action is taken by which the question is fairly presented to the trial court and its ruling thereon during the trial secured.

Wear v. *Window Glass Co.,* 224 Fed. 63;
Barnsdall v. *Waltemeyer,* 142 Fed. 415;
United States Fidelity and Guaranty Co. v. *Board of Commissioners,* 145 Fed. 144;
Mercantile Trust Co. v. *Wood,* 60 Fed. 346;
Bell v. *Union Pacific R. Co.,* 194 Fed. 368;
Seep v. *Ferris-Hagarty Copper Min. Co.,* 20 Fed. 893;
Pennsylvania Casualty Co. v. *Whiteray,* 210 Fed. 782.

It was said by the Circuit Court of Appeals of the the Eighth Circuit:

> "The question whether or not at the close of a trial there is substantial evidence to sustain a finding in favor of a party to the action is a question of law which arises in the progress of the trial. In a trial by a jury it is reviewable on an exception to a ruling upon a request for a peremptory instruction. In a trial by the court without a jury it is reviewable upon a motion for a judgment, a request for a declaration of law, or any other action in the trial court which fairly presents the issue of law to that court for determination before the trial ends. The trial ends only when the finding is filed, or if no finding is filed before, when the judgment is rendered * * * *. No motion, request or act of this nature is recorded in the case in hand, so that the question of the sufficiency of the evidence to sustain the finding and judgment is not open for consideration by this court."

U. S. Fidelity & G. Co. v. *Board of Commissioners,* 145 Fed. 151, 76 C. C. A. 114.

Speaking of certain special findings which were attacked as not being sustained by the evidence, the same Circuit Court of Appeals again said:

> "Whether or not they are supported by the agreed facts and the evidence is the question whether or not they are sustained by the weight of the evidence, and that is a question of fact, which, in a trial of an action at law by the court, as in the trial of such an action by a jury, the national courts are forbidden by the constitution and the laws to review. The only matter invoking the relation of the admissible evidence to the finding of fact of the court on an action at

law that is reviewable by a federal appellate court is the question of law whether or not there was any substantial evidence to sustain the findings, *and that question may be reviewed only when by motion, objection, request for a declaration of law, or some like action, that special issue has been presented to and decided by the trial court, and an exception to its ruling has been taken and allowed before the trial is concluded.* No such motion, objection or request was made in the court below, that court consequently made no ruling upon it, and no exception was taken to any such ruling, and the question of law whether or not there was any substantial evidence in the stipulation of facts and the testimony to sustain any of the findings of fact is not here for review."

Security National Bank v. *Old Natl. Bank*, 241 Fed. 6.

So, also, where a certain special finding was assailed in the Appellate Court on the ground that the evidence was insufficient to sustain it, the Court held that it could only be made a question of law for review in the Appellate Court, by requesting the trial judge to make some declaration that there was no such evidence or to render a judgment for the appropriate party because there was no such evidence, and, upon his refusal to do so, taking proper exception and assigning error thereon.

Felker v. *First Natl. Bank*, 196 Fed. 200.

It is unnecessary to cite the numerous cases in which this principle has been applied. We shall content ourselves with calling the attention of the Court

to a recent decision of this Court where—a jury having been waived—special findings of fact were made in favor of one of the parties. One of these special findings was attacked on the ground that the evidence was insufficient to support it. At the close of the testimony in the case referred to there was no request by the plaintiff in error in that case for a finding in its favor on the issues, and by no motion or request did it present to the trial court, the question of law whether there was substantial evidence to sustain findings for the defendant in error. This Court held that the sufficiency of the evidence to sustain the finding attacked was not open to review in this Court.

> *H. F. Danberg Land & Live Stock Co.* v. *Day,* 247 Fed. 477.

In an action tried by the Court findings of fact are conclusive on the Appellate Court, though it might have reached a different conclusion on the evidence.

> *National Surety Co.* v. *Globe, etc. Co.,* 256 Fed. 601.

II.

THE FINDING AS TO THE MARKET PRICE OF HOPS AT MILWAUKEE AT THE TIME OF THE BREACH OF THE CONTRACT.

Assuming, however, that the two special findings attacked are subject to review for insufficiency of evidence, we shall consider the evidence, and show that they are sustained by the evidence. The plain-

tiff at best can claim a conflict. If there is any evidence at all to sustain the finding, conceding they are reviewable, such evidence is sufficient. Practically the only question before the Court was the amount of damages that should be awarded the plaintiff below. The evidence on both sides was introduced in conformity to the rule laid down by this Court on the former appeal. (229 Fed. 913.)

Naturally as in cases of this character, there was a conflict of testimony as to the market price of the hops (the subject of the controversy) at the time of the repudiation of the contract on November 4, 1912, or thereabouts. The Court found that the difference between the contract price and the market price of the rejected hops at Milwaukee on November 4, 1912, —the time that the defendant cancelled the contract and refused to accept the hops as tendered by defendant in error to plaintiff in error—was six (6) cents per pound. (Record, p. 20.)

The contract price for the hops was twenty cents per pound at California points, plus freight to Milwaukee, which, it was agreed by all the witnesses, was two (2) cents per pound, making the contract price at Milwaukee twenty two (22) cents per pound. The Court thus found that the market price of these hops on November 4, 1912, at Milwaukee, was sixteen cents per pound. The Milwaukee price, as testified by all the witnesses, was the same as prices at Chicago or other eastern points.

The only question is, was there any evidence to sustain this finding.

The best evidence is, perhaps, that furnished by *actual sales* of these hops at or about the time of the repudiation of the contract.

The plaintiff in error (defendant below) brought out himself on cross examination of witness Horst that the hops raised by defendant in error, of which plaintiff in error agreed to buy 2000 bales during the months of November and December, 1912, were sold at Eastern points at the following prices, to-wit:

November 12, 1912, fifteen cents (15c) per pound;

November 20, 1912, fifteen and one-half cents (15½c) per pound;

November 19, 1912, sixteen and one-half cents (16½c) per pound;

November 20, 1912, sixteen cents (16c) per pound;

November 16, 1912, eighteen cents (18c) per pound;

November 12, 1912, fifteen cents (15c) per pound;

November 12, 1912, fourteen and one-half cents (14½c) per pound;

November 20, 1912, sixteen cents (16c) per pound;

November 13, 1912, sixteen cents (16c) per pound;

November 20, 1912, fifteen cents (15c) per pound. (Record, pages 67-68.)

All these hops were sold from samples 1 to 20 introduced in evidence, being the same hops which the plaintiff in error (Pabst Brewing Company) reject-

ed. This evidence was not called for by defendant in error but was brought out by plaintiff in error.

Some of these sales, to-wit, one to Springfield Brewers Company at fifteen cents per pound, one to Frank Steil Brewing Company at fourteen and one-half cents per pound, and the one to F. W. George Company at sixteen cents per pound were made by the witness Horst personally.

As the plaintiff in error brought out this testimony itself, of course, it cannot complain.

The plaintiff in error contended that price of Oregon hops was practically the same as Cosumnes hops at that time. (Record, page 87, fol. 107.)

Plaintiff in error (defendant below) brought out on cross examination that the price of Oregon hops ran from ten (10) to twelve (12) cents per pound, the outside price was about fourteen (14) cents per pound. (Record, pages 87-88, fol. 107, 108.)

The witness Horst testified in answer to questions asked by plaintiff in error that he bought choice Oregon hops from ten (10) to twelve (12) cents per pound, one lot November 25, 1912, at 13½ cents per pound, another lot December 2, 1912, at 12½ cents per pound. (Record, page 88.)

Witness Horst testified that the market value of choice Cosumnes hops in Milwaukee in November, 1912, was 14 cents a pound. That was the range of prices from the first of November until about the first of January. The market was dead all the time. The company of which witness was President made sales of Cosumnes hops during the months of

November and December, 1912, in the eastern brewing centers, at Chicago and New York, and eastern points where the market value was the same as at Milwaukee. The freight rate was the same. The freight rate is 2 cents from California. In the sales of plaintiff's hops in November, 1912—choice Cosumnes hops—in November or thereabouts, the prices ran about 14½ cents to about 17½ cents; they averaged about 15 cents. (Record, p. 49-50.)

F. W. George, who in 1912 was a hop dealer in New York, and who in that year sold hops all over the United States and Canada, and a part of whose business was to become familiar with the market prices of the various kinds of hops, and who made efforts to ascertain from other dealers for what hops were being sold in the market and the prices paid, and who had himself bought choice Cosumnes hops in 1912 and afterwards sold them as choice Cosumnes hops in the regular course of business, and who knew the market price of choice Cosumnes hops in Milwaukee, in November, 1912, testified that the market price of choice hops, the kind contracted for, in Milwaukee in November, was fifteen (15) cents per pound. (Record, pp. 93-94.)

On December 1, 1912, the witness testified that the market price at Milwaukee for hops of the kind rejected by plaintiff in error was fifteen and one-half (15½c) cents to sixteen (16c) cents per pound. (Record, p. 94.)

His testimony was:

"Q. Now do you know the market price of choice Cosumnes hops in Milwaukee in the month of November, 1912? A. Yes.

"What was the market price? A. I would take the market price for the price I paid for them.

"What was it? A. I paid 13 cents delivered. The market price was 15 cents delivered in Milwaukee; that would be 13 cents in California. I paid 15 cents or 15¼ cents, I am not positive which. I am speaking now of November 13, 1912. Between that and January 1, 1913. I think they declined somewhat; it was a dead market; there was not much doing. On December 1, 1912, I would say that the market price of choice Cosumnes hops in Milwaukee was about 16 cents delivered—15½ to 16 cents." (Record, page 94.)

Flood V. Flint, who has been a hop dealer and grower in the Sacramento valley for thirty years, and who has grown hops in the Cosumnes river for ten years, and who had bought and sold as a dealer on commission, and who kept familiar with the price of hops, getting prices by daily telegrams, and who was acquainted with the market price of choice Cosumnes hops in Milwaukee, testified that the market price of choice Cosumnes hops in Milwaukee on November 4, 1912, was about fourteen cents (14c) per pound. (Record, page 272.)

He testified on cross examination that he based his estimate on the fact that he had offers of twelve cents and in the ordinary daily business he offered according to instructions. (Record, p. 274.)

It was for the Court below to weigh the evidence.

We, however, call the attention of the Court to

some glaring statements and inconsistencies, in the evidence produced by the plaintiff in error.

M. D. Wormser, in a deposition, testified:

> "The relative price of Cosumnes and *Oregon* hops and Washington hops and Mendocino hops and Sonoma hops and Russian River hops were about the same as Cosumnes." (Record, page 190.)

It was developed by the plaintiff in error on cross examination of witness Horst that the market price of choice *Oregon* hops was from ten to twelve cents a pound, one lot was bought November 25, 1912, at 13½ cents per pound, and another on December 12, 1912, at 12½ cents per pound. (Record, p. 88.)

If Cosumnes sold the same as Oregons the price would not exceed 14 cents.

It was for the Court below to weigh these contradictions.

Again, Wormser classes Russian hops as being of the same grade as Cosumnes hops and also the same as Oregons. (Record, p. 190.)

Witness Horst says Russian River hops are considered very high in grade. The highest grades are Yakimas, Russian Rivers, then Oregon and Sonomas, then Western Washington; then Yuba County and Yolo County, are higher than Sacramento. (Record, p. 108.)

If Wormser classes the high grade Russian hops as of the same grade as Cosumnes and gives the same market price to each and if there is a market differ-

ence in the grade, it was for the Court below to weigh the evidence.

Again, witness Wormser says that the relative price of Sonoma hops and Cosumnes hops was the same. Witness Murphy, another witness for plaintiff in error says "Cosumnes hops are usually a cent below Sonomas." (Record, page 194.)

Witness Murphy says "the trade do not quote the price of Cosumnes hops; they do quote the price of Sonoma hops and in 1912 Cosumnes and Sonoma hops were about the same value." (Record, page 196.)

If the witness does not know anything about the price of *Cosumnes* hops, it is for the trial judge to say how far the price of Sonoma hops which is a better hop can affect the price of Cosumnes hops.

His testimony relates to "Pacific Coast" hops and he classes them altogether. (Record, page 196.)

So far as the trade journals were concerned there is no question but that they are *admissible in evidence* to be weighed with other evidence and they were received without objection.

But, as testified to by witness for plaintiff in error:

> "The journals referred to by me as being accepted by the trade did not attempt to show how many bales *nor what the prices were, for which they sold* as definite transactions.
>
> "They secured their information and published the range of prices whatever it was as an *interpretation* of the facts which were *reported to them* by the dealer." (Record, page 197.)

Witness George, as developed by the plaintiff in

error on cross examination, testified that he was familiar with the quotations contained in the Brewers Journal and "I found them wrong most all the time." (Record, page 98.)

G. C. Schumacher, another witness called by plaintiff in error, did not know anything at all about the price of Cosumnes hops. He testified:

> "I based the price of choice Cosumnes hops on the price of choice Oregon and choice Sonomas. We always figure that the Cosumnes are worth about a cent less than those qualities. Cosumnes hops were close to the price of Oregon and Sonomas in 1912, but I should think they were and would say so but I have no definite recollection on that point. *I do not know of any trade paper of any kind that quoted Cosumnes hops in November,* 1912. (Record, pages 203, 204.)

If, as stated by this witness, the price of Cosumnes hops is to be governed by the price of Oregon hops we have the testimony of Horst that he bought choice Oregon hops in November, 1912, from ten to twelve cents a pound. (Record, p. 88.)

This witness (Schumacher) testified also that the price of hops would depend upon the samples:

> "You might call it a choice and I might call it a prime. That is a matter of opinion.
> Q. And that is a matter very largely of individual opinion, is it not? A. Yes sir." (Record, page 206.)

This witness also admitted that if the buyer knew that the hops tendered to Pabst had been rejected it would affect the opinion of the buyer. (Record, p. 207.)

He also admitted that during the month of November, 1912, the price of hops had declined. (Record, page 208.)

Witness stated that:

> "Sonoma hops and Mendocino hops are always more in demand than Cosumnes or Butte County or the cheaper grades. A man who wants Sonoma hops will not ordinarily accept Cosumnes hops, consequently they are not changeable merely at a difference in price. The Sonoma hops represent what in the brewing trade is known as the highest quality of California. They are nearer the Oregon type and are distinguishable from the Sacramento type. The Cosumnes are one of the Sacramento type." (Record, pages 208, 209.)

From this testimony it will be seen that the witnesses who testified for the plaintiff in error classed Cosumnes hops as Pacific Coast hops, along with the Sonoma hops, which latter are of a higher grade. If the Oregon type is better than the Cosumnes type, and if choice Oregons were sold in November, 1912, at from ten to twelve cents as testified by Horst (Record, page 88), a finding that Cosumnes hops were worth sixteen cents is very favorable to plaintiff in error.

If any other witness testified to a price different than that of witnesses called, for defendant in error, it simply made a conflict in the evidence.

III.

FINDING AS TO DEFENDANT IN ERROR BEING ABLE, READY AND WILLING TO DELIVER.

The finding that the defendant in error was not able, ready and willing to deliver the hops contracted for is also attacked. Assuming that this finding can be reviewed, the evidence abundantly sustains it.

The contract called for the delivery of two thousand bales of hops of the 1912 harvest.

T. L. Conrad who was superintendent in charge of growing hops for the defendant in error in 1912 in the Cosumnes District testified that there were 4300 bales of cleaner picked hops and 200 bales that were not cleanly picked, making 4500 bales. (Record, p. 91.)

He kept a record with reference to the number of bales. (Record, p. 92.)

Witness Horst who is the president and manager of the defendant in error testified:

> "Q. Will you state whether or not the hops that you grew on your place in 1912, were or were not choice air dried Cosumnes hops. A. Yes.
>
> "Q. State whether you were able or not to deliver out of the 4300 bales you have specified the 2000 bales of hops for the purpose of filling this contract for the Pabst Brewing Company. A. Yes. The samples sent to them were choice air dried Cosumnes hops and they were from these bales." (Record, p. 99.)

He also at another time testified:

> "November 4, 1912, plaintiff had on hand and was able to deliver 2000 bales of strictly choice Cosumnes hops to the defendant." (Record, p. 55, 58.)

It was agreed that a part of the evidence used on the former trial should be used in this trial where Horst testified on cross examination:

> "Yes I have a distinct memory that we had over 3000 bales of hops on hand at the time that Pabst rejected. I know that.
>
> "Q. Where were those bales? How do you know there were 3062 instead of 3015? A. I don't know whether there were 3062 or 3061, but I know there were over 3000 bales." (Record, p. 78.)

Again he testified:

> "On November 4, 1912, we had on hand 3000 odd bales of choice Cosumnes hops. There were about 1300 or 1400 or 1500 bales on the Coast. I am giving you just off-hand figures, and about 400 in Milwaukee; about 600 in New York, about 500 or 600 in transit; something in that neighborhood, and the total made over 3000 bales.
>
> "Are you testifying from a memory of those facts, or from records that you have? A. Well, for those particular figures that I am giving now, I read over the testimony that I gave on the former trial.
>
> "Q. That testimony is based upon figures that were based upon your books is it not? A. Of course at that time when I gave the testimony before, then I knew the figures, then the situation was comparatively new, but now I base my present statement upon reading the testimony on the former trial.

"Q. At the former trial didn't you testify that you had to go to your books in order to get that information? A. I had to go to my books to get exact figures, but in a general way I knew the figures without the books—I knew them at the time.

"Q. As a matter of fact, weren't 300 bales that you gave as being in transit actually sold and delivered at that time? A. No. We were very careful to check up the record with anything we gave you in transit, that was not at that time delivered.

"THE COURT: I certainly think with a little consideration this trial can be considerably shortened. It seems to me any evidence went in at the former trial might be stipulated correct here, and supplement it by such additional testimony as either side wish to introduce.

"MR. POWERS: If your honor rules against me on the proposition of where these 3062 bales were—

"THE COURT: How do you mean ruling against you as to where they were?

"MR. POWERS: As to striking out the testimony of this witness' memory, when it was based on books—

"THE COURT: I cannot accede to your suggestion that it is based on books. He has just repudiated that a moment ago.

"MR. POWERS: He said about, and he gives now the figures.

"THE COURT: He has testified here within five minutes that his present testimony is given by refreshing his memory as to what he testified to before; but his memory at that time was refreshed as to the substantive facts, that he had had that quantity of hops on hand either here or in transit, or in Eastern points; that he had to go to his books for the specific figures, which, of course, one would assume that would be necessary to do, but that he knew in a general

way the qualities and location of those hops. That is not a dependance upon the books." (Record, p. 80-81.)

Of the hops in question about 1500 bales were on the coast, 400 bales in Milwaukee, 600 bales in New York, 500 to 600 bales in transit. (Record, p. 79.)

In the Court below the plaintiff in error attempted to establish the proposition that the only hops which the defendant in error had ready to deliver was the quantity on the coast.

In the brief of plaintiff in error it is conceded that 4350 bales of hops were produced. (Brief, p. 36.) Plaintiff in error says that the amount sold was 2764 bales. This concedes 1586 bales. These are the bales on the Pacific Coast testified to by witness Horst. Plaintiff in error claims that the bales of hops in transit amounting to 500 to 600 bales and the hops in warehouses in the East were sold. The witness Horst testified that these were not sold; that they were forwarded to Eastern points to be applied on prior contract of sales of *Pacific Coast* hops They were not sold until after November 4, 1912, the date of repudiation of the contract. (Record, p. 58.)

The times at which the hops constituting a portion of the 3000 bales on hand on November 4th, 1912, were sold were given. They were sold after November 4th, 1912. (Record, p. 67.)

At another point in the record it was testified by witness Horst:

"We had on hand 3000 bales of choice Cosum-

nes hops on November 4th, 1912." (Record, p. 55.)

Plaintiff in error examined the so-called invoice book of the defendant in error in which certain entries appear showing that certain of these hops were assigned to certain brewers for subsequent sale and delivery if accepted and claims these to be sales. The matter was fully gone into in the Court below and it was explained that when it became evident that the plaintiff was endeavoring to get a ground for the rejection of the hops in suit, Horst Co. shipped a quantity of them East to be sold to other brewers if Pabst Co. finally refused to take them, and to be sold only after such refusal. These hops were in warehouses and were always in the ownership, possession and control of the defendant in error until actually sold after November 4th, 1912, as explained by the witness. (Record, p. 58.)

It appears by a night telegram of September 27th, 1912, that the plaintiff in error was trying to resell these hops and wished them kept on the Coast. Defendant in error was willing to hold them on the Coast if plaintiff in error would accept deliveries, otherwise, it wanted to ship a part of them to the East to be sold. (Record, p. 30.)

The contract was repudiated November 4th, 1912. Between September 27th, 1912 and November 4th, 1912, certain hops were sent East remaining in the control, in warehouses, however, of defendant in error. Defendant in error had as testified over 3000

bales on hand to satisfy the 2000 bale contract with plaintiff in error.

Witness Horst also testified that he and one of the attorneys had made up a list which showed that the defendant in error had over 3000 bales of hops on hand on November 4th, 1912. The evidence is as follows:

> "Q. (By Mr. Powers, attorney for plaintiff in error) How do you know that you actually had 3062 bales available on November 4th? A. I know from this list here that you and I made up yesterday that I had over 3000 bales. Invoice number 1077, referring to lot 509 was made up in the New York office." (Record, page 84.)

The defendant in error did not rely on books but the witness produced knew of his own knowledge of the quantity of hops which the defendant in error had on November 4, 1912.

It was sought to contradict him by entries in books. These entries did not relate to the sale of hops but were meant to show their location and hops were still in the possession of the defendant in error until applied to a particular sale delivered and accepted. (Record, p. 85.)

IV.

CERTAIN RULINGS ASSIGNED AS ERROR.

There are certain rulings to which we suppose plaintiff in error does not attach much weight as they are not argued at length, but we shall notice them.

None of them were in way prejudicial to the rights of plaintiff in error, and the plaintiff in error now assigns different grounds of objection from what it did in the Court below.

1. As to asasignment of error No. 48 Witness George was asked the question:

"If you had a quantity of 2000 bales of hops to sell in the East in Milwaukee what would be a reasonable time to dispose of those hops at the market price. Could you expect to sell 2000 bales of choice Cosumnes hops at Milwaukee at the price then prevailing in thirty days?" The principal objection to the question was that the question was confined to Milwaukee.

The objection if it had any value, was cured by the Court asking:

"What would be your answer to that if the question were to confine it to the Eastern market instead of Milwaukee alone?"

The witness explained that the market was a lifeless one—a declining market—and his answer embraced the entire East. (Record, p. 95.)

2. The next assignment is the refusal to allow a question to Witness George as to the value of Oregon hops. The reason given in the Court below was that the question was to test his memory. The reason now assigned is an entirely different one. (Record, p. 91.)

3. The question asked witness George: "If other Cosumnes hops at that time were selling to brewers at from 22 to 24 cents per pound would not that (a sale of Horst's manufactured hops for 16 cents) in-

dicate that these hops which were sold by you to the Narragansett Brewing Company a poor quality?"

We do not find this question in the record. But as there is no objection raised in the brief to the finding that hops were of the quality contracted for the question is immaterial.

The judgment should be affirmed.

Respectfully submitted,
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DEVLIN & DEVLIN,
Attorneys for Defendant in Error.

No. 3427

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

PABST BREWING COMPANY, a corporation,
Plaintiff In Error,

vs.

E. CLEMENS HORST COMPANY, a corporation,
Defendant In Error.

APPELLANT'S PETITION FOR REHEARING

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Appellant and Petitioner

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Defendant in Error.

No. 3427

Appellant Petition for Rehearing

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes the above named, The Pabst Brewing Company, the plaintiff in error, and hereby petitions the court for a rehearing of the errors which it seeks to review, and as ground for such relief alleges and shows:

This petition is filed because it appears from the opinion that the court has overlooked the fact that by the law of the case fixed by the former opinion, as well as by the well defined rule everywhere, the

market value at Milwaukee could not be inferred from the price at which a few sales were made at places remote therefrom.

It is the decision of this court that the plaintiff in error's contention that the trial court based its finding of fact as to market value upon wholly incompetent evidence which the previous decision in 229 Fed., 913, held should have been excluded upon the second trial, is refuted by the record. Three witnesses testified for the defendant in error on market value—Mr. Horst, Mr. George and Mr. Flint. None of them, as appears from the cross-examination, knew of any sales in Milwaukee at the time in question.

MR. HORST admitted at the time of testifying that he did not know the market. "I knew it at the time but I do not know it now." (R., p. 62.)

MR. GEORGE admitted that he knew of no sales in or about Milwaukee, nor did he know of any sales in Chicago. (R., pp. 96 and 97.) He was basing his opinion of value upon what he sold them at, (R., p. 97) and the sales made by him disclose that they were at places remote from Milwaukee.

MR. FLINT testified:—"I do not know of any that were sold at that time in Milwaukee. I did not sell any." (R., p. 273.) "Q. Have you any recollection of any sales of Cosumnes hops of purchases in the months of November and December, 1912? A. No, I have not them in mind now, I cannot recall them." (R., p. 274.)

Therefore the testimony of all of the witnesses for Horst on the matter of market value must have been merely an inference or guess, which at best could only have been based upon testimony of sales made at places remote from the Milwaukee market. Such evidence, the law of the case ordered should be excluded as incompetent upon which to base a market value in Milwaukee. This was particularly true because there was not only a market at Milwaukee but a market of large volume in Chicago, where market prices were shown by trade bulletins. The opinion evidence of these witnesses upon which this court now seems to rely is nothing but an attempt on the part of the witnesses to pursue a course of reasoning—to draw an inference—which was forbidden to the trial court by the former decision. The legitimacy of an inference as to the Milwaukee market predicated upon sales at the Atlantic coast is negatived as a matter of law, by the previous decision. Surely that which was not evidence before cannot become evidence now merely because witnesses have taken the witness stand to pursue a course of reasoning which was forbidden to the lower court by the former decision.

Unless the former decision and the fundamental rules of law upon which it is based are disregarded, there is no conflicting evidence to be weighed. A witness' statement as to value, if based upon an improper method of valuation, does not raise a conflict or put in issue the testimony of another witness based upon a method of valuation sanctioned by law.

In *Batavian Bank* v. *North,* 114 Wis., 637, 90 N. W., 1016, the first headnote is as follows:

> "Opinion evidence as to an ultimate fact, based on a correct theory of the underlying facts, met by like evidence upon a wrong theory of such minor facts, does not create a conflict for solution by a jury."

In *State* v. *Williams,* 123 Wis., 61, 68, 100 N. W., 1048, the court said:

> "It is said that the evidence on relator's side was consistent with the statutory basis for valuing the property, while that in support of the assessor's valuation was on an illegitimate basis. *True,* as counsel claims, *in such circumstances there is no conflict and the evidence on the side supporting the correct theory should be regarded as the sole evidence to base a decision on."*

In the case of *Winslow* v. *Glendale Light & Power Co.,* 130 Pac. Rep., p. 427, the California Court held: (quoting from syllabus)

> "In an action against a light and power company for personal injuries, defended on the ground that the accident occurred through the negligence of an independent contractor, the conclusion of a witness, improperly admitted as competent, that he was employed by defendant, when in fact he was employed and paid by the contractor and knew nothing of any arrangement of his employer with defendant, and thought that his employer was merely defendant's foreman, as against uncontroverted evidence that his employer was an indepen-

dent contractor raised no conflict in the evidence as to the relations of the parties."

And in an Alabama case, the Supreme Court of that State decided (quoting from syllabus):

> "Where a witness states an opinion or conclusion which is irreconcilably opposed to the stated facts upon which it is founded, the opinion or conclusion is of no weight and raises no conflict with the stated facts."

Hicks v. *Burgess,* 64 So., 290-1.

In *Rogers* v. *Village of Orion,* 74 N. W., 463, the Michigan Court held (quoting from syllabus):

> "The opinion of a witness that a sidewalk was rebuilt because it required rebuilding is incompetent, where it was rebuilt by a railroad company whose employees testified it was rebuilt because of a change of grade."

Jones on Evidence (2nd Ed.), Sec. 371, says:

> "If the foundation for the evidence is removed there is of course no basis for the super-structure."

Following the reasoning in the above cases, if such opinion evidence so erroneously based upon an insufficient premise does not raise a conflict with opinion evidence formed upon a correct hypothesis then surely ill-advised opinion evidence cannot raise a conflict with evidence of the ultimate fact proven by direct testimony. In other words, it is our contention that

the opinion evidence of market value by the witnesses referred to does not raise a conflict with the market prices—the ultimate fact to be established proven by showing the actual transactions that took place in Milwaukee in hops of the character in issue and which were corroborated by the actual transactions shown to have taken place in Chicago, the next nearest available market to the one determined by the law of the case to be the criterion from which the defendant in error should measure his damages.

Market Value

> "Market value is not an imaginary fictitious thing, but is the price at which goods are actually being sold in the market at the time or times in question."
>
> *Birdsong & Co.* v. *Marty,* 163 Wis., 516, 524.

> "Market value at any given time is fixed by sales made at or about that time."
>
> *Carley* v. *Nelson,* 145 Wis., 543.

According to judicial definition, market value is the price obtained for a given commodity in the ordinary course of business—that price reflected by actual transactions resulting from the closing of negotiations between a person willing to sell but not required to do so, and a person desirous of buying but not forced to do so. In other words, the fundamental test of market value is the price realized on

actual sales. The fallacy of opinion evidence as to the market price of a given commodity not based upon the price at which actual sales take place, is best illustrated in referring to a commodity for which there are regular market exchanges recording each such transaction. To permit a witness having no knowledge of these actual transactions to venture a guess as to the market value of that commodity at a particular time in a certain market would reduce to an absurdity the principle upon which market value shall be established. Mr. Justice Mitchell of Pennsylvania in *Dawson* v. *Pittsburgh,* 159 Pa., 317, 28 At. 171, thus expressed himself on this subject:

> "It is a matter of opinion at best and the lowest grade of evidence that ever comes into a court of justice. *It is permissible only because bad as it is, there is nothing better obtainable. . . .*"

Here the ultimate fact to be established—the price at which sales were being made in the ordinary course of business—was proven by direct testimony in the Milwaukee market and which was confirmed in toto by evidence of the sales of large quantities in the Chicago market. (R., pp. 171, 172 and 200.)

> "Reasoning is a proper function of a judge, jury and counsel. It is not part of the normal proof of a witness. He is to state facts rather than opinions. Where a fact is susceptible of proof by direct evidence, opinion evidence is properly excluded."

17 *Cyc. of Law,* page 25.

So it was held in *Federal Insurance Company* v. *Munden*, (Tex.) 203 S. W., 917:

> "The facts upon which the witness based a conclusion and not his conclusion upon undisclosed facts is the standard, since to admit his conclusion or inference from the facts is but to determine the given issue upon the reasoning of the witness, while the rule is for the witness to give the facts and leave to the judge or jury the function of reasoning from the facts furnished. Such it seems to us, is basically correct."

We therefore restate that the opinions of all of the Horst witnesses who testified to market value at Milwaukee, if there was any foundation for their conclusions, must have been based upon sales at remote points from the place in issue and which this court had held in its previous decision to be improper upon which to determine the market price at Milwaukee. It is a well established rule in all jurisdictions that testimony based upon a hypothetical question which is faulty by reason of the inclusion of an impertinent, or the omission of a pertinent fact, raises no conflict with other testimony predicated upon a hypothetical question containing all the vital facts.

THE FACT THAT AFTER THE WITNESSES CALLED BY THE DEFENDANT IN ERROR HAD TESTIFIED ON DIRECT EXAMINATION TO MARKET VALUE AT MILWAUKEE, WERE CROSS-EXAMINED, AND IT WAS DEMONSTRATED

ON SUCH CROSS-EXAMINATION THAT THEIR INFERENCES WERE BASED UPON SALES AT PLACES REMOTE FROM MILWAUKEE, DOES NOT WAIVE THE RIGHT OF THE PLAINTIFF IN ERROR TO ASSERT THAT SUCH OPINION EVIDENCE IS A NULLITY BECAUSE BASED UPON AN IMPROPER PREMISE.

When we cross-examined these witnesses for this purpose it was to show that their statements were not evidence; that when proper rules of law were applied, their testimony raised no conflict with the testimony of the witnesses of the plaintiff in error and the documentary evidence showing both the Milwaukee and the Chicago markets. By the present decision the Court, in effect, holds that we should have anticipated, when we demonstrated that the statements of value made by the defendant's witnesses were on an illegitimate basis, that the trial court would disregard the previous decision of the Court of Appeals and by applying erroneous rules of law fix a market value at Milwaukee from facts having no probative force and no value as evidence under the former decision. This process does not involve the function of weighing evidence. In order to weigh evidence there must be some evidence on each side of an issue. The testimony of the plaintiff's witnesses is of no probative force or evidentiary value whatever if the rule of damages prescribed by the former opinion is to be applied. The witnesses merely attempted to do what the court was forbidden to do. A process of reasoning which, as a

matter of law, leads to a *non sequitur* when indulged in by a court must have the same effect when indulged in by a witness.

When, by cross-examination, we demonstrated that the testimony of the witnesses, Horst, George and Flint, furnished no information upon which market value could be predicated if the rule of the former opinion were applied and that such testimony dealt entirely with a matter of valuation erroneous, as a matter of law, the testimony thereby outlawed itself and became of no probative force or evidentary value.

Jones on Evidence (2nd Ed.), sec. 895.

Surely when, by cross-examination, we demonstrated that the testimony of these witnesses could not be helpful or material in ascertaining market value under the rules of law we did not thereby consent that the trial court might turn its back upon the rules of law and apply any illegitimate method of valuation which would fit into and make pertinent the testimony of these witnesses.

The situation is exactly analogous to a case where a party testifies to an oral agreement made with another party but fails to give the date, and upon cross-examination it is developed that the agreement dealt with exactly the same subject-matter as a written contract and the agreement was made prior to the written contract. The result of such cross-examination would be that when plain rules of law were applied the alleged oral agreement would have no effect be-

cause, as a matter of law, it would be merged in the written contract; yet, under the present decision of this court consistency would require that in such a case it be held that the cross-examination showing the subject-matter of the oral agreement and that it preceded the written agreement in point of time, was, in effect, a waiver by the party so cross-examining, of the application of rules of law, and a consent that the trial court might abandon the rule which would hold the verbal arrangement to be of no consequence because merged in the written agreement.

All that has happened here is that the witnesses have overruled the previous decision of this court. It seemed to us entirely sufficient to establish, by cross-examination, that the testimony of the witnesses, Horst, George and Flint, amounted only to the drawing of the inference which this court previously said could not be drawn. The present opinion, however, recognizes the right of the witnesses to overrule the previous decision, to change rules of logic and of law and give evidentiary value to testimony which, by well recognized rules of law and by the former decision of this court is without evidentiary value and relates solely to immaterial matters when the proper test of market value is applied.

In *Brockman Com. Co.* vs. *Aaron,* (Mo.) 130 S. W., 116, the court held:

> "It is within the province of appellate courts to ascertain whether testimony has any evidentiary

strength, and if found to be impotent, to cast it aside as though it had not been given."

We submit that if this court adheres to its former decision in this case, it must be held that the opinion evidence of the Horst Company witnesses is impotent and does not create a conflict with the proofs of plaintiff in error of actual sales at Milwaukee which was direct evidence tending to prove the ultimate fact, to-wit: the market value at Milwaukee of hops of the character in issue on November 4th, 1912, or soon thereafter, which was the time and place fixed as the criterion upon which the defendant in error was to measure the loss, if any, that it has sustained by the alleged breach of contract.

AS TO DENIAL OF MOTION TO STRIKE OUT TESTIMONY OF WITNESS HORST AS TO NUMBER OF BALES ON HAND ON NOVEMBER 4TH BECAUSE NOT BEST EVIDENCE.

We respectfully submit that this Court has inadvertently omitted to rule upon assignment of error No. 52 (p. 259 Record) which was specifically urged in our oral argument, namely, that the lower court erred in refusing to strike out witness Horst's testimony that the Horst Company had 2000 bales available for delivery to Pabst Brewing Company when on cross-examination he admitted that his testimony was based on reading over his record at the former trial, which testimony was based on the books of Horst Company not in evidence. His testimony to that effect on direct

examination was that he remembered that they had on November 4th, 1912 something over 3000 bales (R. P. 46). On cross-examination, the witness testified (at p. 80) that his testimony at the second trial was based upon reading over his testimony at the former trial. The witness admitted that at the former trial he was compelled to go to the Horst Company's books to get the exact figures but claimed that, in a general way, he knew the figures without the books. The record shows that the books were not introduced in evidence.

Pabst Company then moved to strike the testimony out on the ground that it was not the best evidence (pp. 78 and 81). This was denied and excepted to.

Similar testimony of the same witness with reference to the number of bales on hand appears at various places throughout the record of Mr. Horst's testimony.

There is no other evidence of the number of bales Horst Company had on hand on November 4th, 1912 except a statement prepared by Horst at the former trial showing 1503 bales (p. 74).

This court bases its present decision on the testimony that some 1500 bales of the hops were on the Pacific Coast, that 400 were in Milwaukee, 600 bales in New York and 500 to 600 bales in transit, and that Horst Company retained control of the hops while in the Eastern States prior to November 4th, 1912. But this testimony was admitted by Mr. Horst to be his memory of what his former testimony was as shown by the record of the former trial.

This was one of the many forms in which Mr. Horst testified he remembered these facts as to the whereabouts, condition of sales and right to transship hops, but the record conclusively proves that he based this testimony upon his memory of the entries in Horst Company's books.

Judge Rudkin on the former trial (229 Fed. p. 918) held there was not the slightest testimony as to how these books were kept, and that evidence based thereon was hearsay.

These books were not introduced in evidence at either trial.

This procedure here under discussion practically forced Pabst Company to accept the testimony of the memory of the President, manager and principal owner of Horst Company as to the contents of the books as the facts without a chance to cross-examine with reference to the same.

Pabst Company never have been given an opportunity to cross-examine any witness who made any entry in these books, in any way either as to the manner and character of so-called sales, nor to the actual number of bales on hand as shown by these books or otherwise.

The introduction of extracts from the books without introducing the books was held error by Judge Rudkin at the first trial (p. 918).

Certainly this defect in manner of introducing contents of their books cannot be remedied by the simple expedient of having Mr. Horst testify that he remem-

bered the facts as to the whereabouts and condition of the sales of 3062 bales when his testimony on cross-examination shows he had no independent memory thereof and based his testimony on reading his former testimony based on these books.

> In fact, he testified "I don't know whereabouts they were in Chicago or in New York or where they were stored in Milwaukee, but I can find out" (R. p. 57). "I can't tell you off hand. They were in the warehouse and on the railroad tracks. We have got a record of it and I will furnish the record. My recollection is that there were only 1300 bales on the Coast. I will find out" (R., p. 57).

and again

> "There were about 1300 or 1400 or 1500 bales on the Coast" (p. 79).
>
> Q. "Are you testifying from a memory of those facts or from records you have?" (p. 80).
>
> A. "Well for those particular figures that I am giving now I read over the testimony that I gave on the former trial."
>
> Q. "That testimony is based upon figures that were based upon your books, is it not?
>
> A. "Of course at that time, when I gave the testimony before, then I knew the figures; thence the situation was comparatively new, but now I base my present statement upon reading the testimony on the former trial."
>
> Q. "At the former trial didn't you testify you had to go to your books in order to get that information?"
>
> A. "I had to go to my books to get exact figures but in a general way I knew the figures without the books. I knew them at that time" (p. 80).

Certainly there could be no more complete admission that his testimony on the number of bales, their position and the condition under which they were held, was hearsay.

The witness was not the person who made the entries in the books nor did he keep the record of the former trial.

His testimony would not have been admissible evidence on direct examination if it had been accompanied by his subsequent explanation. Counsel for Pabst Company made their motion to strike out immediately upon the evidence showing the real basis of the testimony on direct examination, viz.: On cross-examination. It could not act before the facts were in evidence. It was the orderly method of procedure.

The Alabama Court has held (quoting from syllabus):

> "A witness on direct examination testified to a fact. On cross-examination it was shown that the only way he knew anything about the fact testified to was that somebody had told him about it. The cross examiner thereupon moved the Court to exclude the testimony of the witness as hearsay. Held that as the cross-examiner had availed himself of the first opportunity to have the evidence excluded the motion should have been sustained."

Theodores Land Co. v. *Lyon* (41 So., 682).

That the use of such so-called refreshing of a witness' memory is not proper method of introducing

evidence was held by *F. Dohmen Co.* v. *Niagara Fire Ins. Co.,* 96 Wis. 38, the Court saying:

> "The most that can be said is that he had a general familiarity with the business as it was transacted. *There is nothing to show that an inspection of the books refreshed his memory and recalled previous actual knowledge of such transaction.*"

In *Chicago Lbr. Co.* v. *Hewitt et al.* 64 Fed., 314-6, Lurton, Justice, said:

> "But it is equally true that the date upon which these entries had been made had been obtained from another, and that the witness had no such personal knowledge as to the correctness of these data as to enable him to say anything more than that he had correctly recorded the results obtained from data furnished by another."

Witness Horst himself supplied a compilation of the number of Horst grown hops sold after November 4th, 1912, which appears in full at pages 72 to 74 of the record—giving a gross total of 1711 bales which when reduced by bales used for other purposes (Claims 37 Cut up 2 Delivered on pickouts 169) shows the total number on hand on November 4th, 1912, capable of delivery to Pabst Company as 1503.

Even though Horst Company continued in control of the hops in the Eastern States they could not have delivered them to Pabst Company without occasioning a loss to themselves. The record shows that other

than the 1503 bales accounted for by Mr. Horst's testimony as having been sold after November 4, 1912. There were but two classes left—one consisting of 497 bales which Mr. Horst testified "were used on sales that we made prior to November" (p. 68) and delivered at an average price of 17 cents per pound (p. 69), and another class of 1062 bales delivered on former contracts—that were sold at prices "in excess of 20 cents per pound" (p. 86).

Certainly, therefore, if these bales were used for delivery to Pabst Company when the findings are that hops were 16 cents per pound in Milwaukee it would require the testimony of some one familiar with the facts, when the entries were made in the books to ascertain where the hops were stored, whether the hops were available for sale after November 4, 1912, at 16 cents per pound, and how much the freight charges from the place of storage to Milwaukee was, in order to ascertain how much their sale affected the item of damages in the findings.

Mr. Horst testified he did not know where they were stored (supra).

It must appear that the defendant in error could have introduced the witnesses who made the entries in the books and could have proven the number of bales Horst Company had on hand on November 4th, 1912 by his books if properly introduced. Consequently, there was no reason shown why secondary evidence should have been introduced.

Had the books been introduced properly the Pabst Company's Counsel could have cross-examined as to the terms and conditions of delivery. They were foreclosed from doing so by Mr. Horst testifying from his memory of the record at the former trial.

This Court at the former trial held (p. 918):

> "The books themselves afforded the primary evidence of their contents and as long as they were accessible and unaccounted for, any evidence as to what they contained or showed was secondary and incompetent. * * * Furthermore the books were not identified or proved so as to render them competent if offered, * * * there was not the slightest testimony as to how the books were kept, when the entries were made or the sources from which they were made."

Under an almost identical state of facts, the Georgia court held that an attempt to refresh testimony in a similar manner was inadmissible in the following language:

> "The plaintiff in this case, though its name would indicate it was either a corporation or a partnership, really consisted of but one natural person,—Linton Sparks. Having failed in every other way to make out his case, he offered himself as a witness, and undertook to testify from his own personal knowledge to the delivery of certain car loads of ore to the railway company. Although he testified, in general terms, that he remembered the numbers by which these cars were identified, their destinations, and the dates of their shipment

to be as stated by him on the stand, and that he used certain books and memoranda to refresh his memory, it is apparent he did not in fact have any definite or distinct recollection concerning the matters about which he spoke. He admitted on cross-examination that without the memoranda 'he could not remember numbers, dates, or destinations of any particular car.' The books which he stated he used to refresh his memory were not before him while testifying, and he relied solely upon memoranda taken therefrom. It further appeared from his testimony that the entries in the books were sometimes made by himself, and sometimes by another in his employ, and he was unable to state which entries had been made by himself, and which by the other. It is therefore manifest that, deprived of his memoranda, the witness would have been utterly unable to state anything definite concerning the alleged shipment of the cars, and that his professed recollection of the transaction really amounted to nothing. He was simply undertaking to swear to the correctness of information he himself had derived solely by consulting certain books, and copying extracts therefrom. Of the reliability of the books themselves there was no proof whatsoever. If the entries in the books had all been made by himself, and he had sworn to their correctness, and had stated that he had, at the time such entries were made by him, personal knowledge of the matters in question, his testimony would have been admissible. It appearing from his own testimony, however, that some of these entries were made by another person, and he not undertaking to distinguish those entries from others made by himself, or to state that he had ever had any personal knowledge of the matters to which they related, his testimony can only be

characterized as being, to a greater or less extent, mere hearsay, and utterly unreliable. No reason appears why the books themselves, together with proper proof of their correctness, were not produced. Had this been done the witness might at least have verified the correctness of his statements based on entries made by himself, and thus have given some force to the assertion that his memory had thereby been refreshed. We think that his testimony, in the manner in which it was presented, was clearly inadmissible, and that the court properly rejected the same.

Hermatite Mining Co. vs. *East Tennessee,* 18 S. E. 24-25.

We respectfully submit that the trial Court erred in not striking out the testimony of witness Horst as to the number of bales available on November 4th, 1912 when on cross-examination it appeared that this was not the best evidence (p. 79).

Dated May ~~23rd~~ 16th, 1920.

Respectfully submitted,

HELLER, POWERS & EHRMAN,
FRANK H. POWERS,
Attorneys for Plaintiff in Error.

HENRY W. STARK & JAMES D. SHAW,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am one of the attorneys and counsel for appellants and petitioners in the above

entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated: San Francisco, May ~~24th~~ 26th, 1920.

FRANK H. POWERS,
One of the attorneys and Counsel
for Appellants and Petitioners.

No. 3427

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

'20

PABST BREWING COMPANY,
a Corporation,
Plaintiff in Error

vs

E. CLEMENS HORST COMPANY,
a Corporation,
Defendant in Error.

Answer to Appellant's Petition for Rehearing

W. H. CARLIN
MAURICE E. HARRISON
DEVLIN & DEVLIN
Attorneys for Defendant in Error.

ANDERSON PRINTING CO. SACRAMENTO. CALIF

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ANSWER TO APPELLANT'S PETITION FOR REHEARING.

We have been served with a copy of appellant's petition for rehearing, in which the appellant reiterates its previous arguments that have already received the attention of the court. No answer is necessary in our opinion, as nothing new is presented, but we submit the following reply.

I.

Any objection that might be made to evidence is waived unless it is objected to and an exception taken.

Where no objection was offered, exception taken, or motion made to strike out, it cannot be urged

upon appeal that certain evidence was inadmissible because hearsay.

Central R. Co. of N. J. v. *Sharkey,* 259 Fed. 144.

The Supreme Court of the United States has held that statements of a witness, although based upon hearsay, constitute evidence in a cause unless reasonably objected to as hearsay.

Schlemmer v. *Buffalo etc. R. R. Co.* 205 U. S. 151 L. Ed. 681.

II.

Plaintiff in error does not attempt to attack that part of the opinion which holds that no finding of fact is reviewable for failure of plaintiff in error to request findings or to request a ruling or to take any exception.

III.

Both sides below tried the case upon the theory that the measure of damages was the difference between the market price at Milwaukee, on or about November 4, 1912 (the date of the breach) and the contract price. The plaintiff in error took a wide range without objection from us. It showed that the Milwaukee price was the same as the Chicago price, and the price at other Eastern points, and that the Eastern price or Milwaukee price was the same as the California price plus the freight from California to the East.

Thus a witness for the plaintiff in error showed

that the market for hops at Milwaukee is the same as at Chicago. "There is no difference in the sale price of Pacific Coast hops in Milwaukee from Chicago". (R. p. 193).

Another witness for plaintiff in error (John M. Spicer) testified that he was familiar with the price of choice Consumnes hops in the *Sacramento market* on November 4, 1912, or thereabouts. "I bought three lots of hops at that time at 18 cents." (R. p. 184).

Another witness (Otto Koch) for plaintiff in error testified as to the prices in the Sacramento market. He dealt in hops in the Sacramento section. (R. p. 183).

The plaintiff in error called P. C. Drescher to prove the Milwaukee price, and asked him if he was familiar with the Milwaukee price. He said he was not. It then proved by him that the market in Milwaukee was the same as at Sacramento, plus the freight and had the witness take the Sacramento price and add the freight price to obtain the Milwaukee price. (R. p. 229).

Another witness called for plaintiff in error (M. D. Wormser) testified that the Chicago market for hops of the character of the Consumnes hops is the same as the Milwaukee market (R. p. 188). And again "We did not sell hops in Milwaukee in November 1912 or the next month or two thereafter. We very seldom make Milwaukee, but I am familiar with the prices at Milwaukee because the prices are the same in Milwaukee *as in any other city, be-*

cause the feight rates are the same. We sold hops in other cities at that time but we made Milwaukee very little." (R. p. 188).

Another witness for plaintiff in error (G. G. Schumacher) testified: "There is no difference in the market price of hops in Chicago and Milwaukee." (R. p. 203).

He also testified that he "based the price of choice Consumnes hops on the price of choice Oregon and choice Sonomas. We always figure that the Consumnes are worth about a cent less than these qualities." (R. p. 204).

IV.

Defendant in error called witnesses who testified as to the market price in Milwaukee. No objection was made to this evidence. It is entirely sufficient. But even if it were entirely eliminated the finding of the court is sustained by.

(a) Actual sales at prices that averaged 15.7 cents per pound. This testimony was brought out by the plaintiff in error. (R. p. 67-70).

(b) By comparison with the sale of Oregon hops as shown without contradiction. (R. p. 108).

These points were fully argued in our prior briefs.

V.

As to the quantity of hops this fact was established by the evidence of E. Clemens Horst and also Ernest Lange. (R. p. 79-80).

No attempt is made to criticise the testimony of Lange which is more than sufficient to sustain the finding.

We recognize the futility of arguing before this court questions upon which witnesses differed in the court below, but submit the foregoing with the remark that all points have been fully argued in the briefs on file.

Respectfully submitted,
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DEVLIN & DEVLIN.
Attorneys for Defendants in Error.